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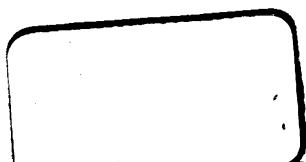
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JOHANNES VO

JURISCONSULT AND PROFESSOR
UNIVERSITY OF LEYDEN.

COMMENTARY ON THE

INSTITUTES AND THE
LEGES, OR THE
FUNDAMENTALS OF THE
ROMAN LAW,
AS THEY ARE
APPLIED, AND THE
MODE OF PRACTICE

TRANSLATED BY
JAMES BUCH

WITH NOTES AND A
GENERAL INDEX.

Vol. I., Bk. I. (Title) 1-22, pp.

L.C. JUTA, CAPE TOWN
1880

L.L.

Personnel

512

1372 Bc

JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

HIS COMMENTARY ON THE PANDECTS:

WHEREIN, BESIDES THE PRINCIPLES AND THE MORE CELEBRATED
CONTROVERSIES, OF THE ROMAN LAW, THE MODERN
LAW IS ALSO DISCUSSED, AND THE CHIEF
POINTS OF PRACTICE

TRANSLATED BY
JAMES BUCHANAN,

*Senior Puisne Judge of the High Court of Justice of the Orange Free State,
South Africa.*

Vol. I., Bk. I. (Tit. 1-22., p.p. 1-88).

J. C. JUTA, CAPETOWN.

—
1880.



PRINTED AT THE OFFICE OF THE
ORANGE FREE STATE NEWSPAPER COMPANY,
BLOEMFONTEIN.

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PREFACE.

The translation of *Voet* has occupied my attention during many years. I now commence to offer it to the Profession, by the publication of this first part. I have thought it right, in justice to the author himself, and for the better comprehension of his great and laboriously performed task, to begin at the beginning, and accompany him through his work so carefully planned and arranged by himself, rather than to select lighter portions here and there, however valuable in themselves. In this way too, I believe, will the greatest advantage be obtained from a systematic study of this great Master in the Law, to whom the practitioner has never, as far as I have observed, had recourse in vain, whether he seek the principles of the law or the points which occur in daily practice. It has been well said that he who is thoroughly at home in *Voet* needs no better guide or companion in his studies or practice than this illustrious commentator, on whom the great Merlin has, for his clearness and logic, bestowed the title of "The Geometer of Jurisprudence."—(*Quest. de Droit Confession; Sec. 2, Note 1*).

I have noticed, within my own experience, the benefit of an exact reference, in the text, to the different portions of the *Corpus Juris*, where cited by the author. I have therefore added, *in numerals*, the particular books of the Institute, Digest, or Code referred to under the more technical signs, such as *ff.*, &c.

I have also amplified the "Summaries" at the head of each Title, so as to make them as perfect a *précis* as possible of the contents of the Title. The student

or practitioner can thus first peruse these by themselves, if he wish, and in this way get a compendious view of the work, before more carefully going through the valuable text itself.

I have likewise added an Index of Leading Contents, under which I have tried to embody a reference to each proposition laid down by Voet; and in these three ways, I am emboldened to hope, have made the work still more immediately valuable than it was left us by its learned author.

I venture, therefore, to commend this translation to the notice of the members of the Profession, appealing to their kindly consideration for any possible shortcomings their greater learning may discover, as what I thus lay before them was done under the pressure of, or in the intervals from, severer duties. In view of a future edition, I would also be particularly obliged to them for any emendations they would suggest, and to which I shall give my careful consideration.

JAMES BUCHANAN.

Bloemfontein, O.F.S., March, 1878.*

* It is necessary to explain as to this date that I was about publishing this part in 1876, before Sir Roland Wilson's translation of Title 18, Bk. I., first appeared. On its appearance, I stayed my hand in deference to him. Mr. Juta afterwards wrote me that Sir R. Wilson had ceased. I again contemplated publication, and had this part ready for the press in 1878, but for certain reasons it was not then published. Urged thereto, I now commence the publication, and shall have it through the press as rapidly as possible.

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*Therefore Sande's authority must often be specially read with this qualification.—Transl.

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TITLE I.

ON JUSTICE AND LAW.

SUMMARY.

1. Concerning the necessity of laws; and the first, leading, authors of laws among nations: then of the author's scope in this work. Surveying the origin and growth of mankind, he shows it has never been without rules as to the right and honest, neither in primitive ages, nor in more corrupt times. Afterwards it became necessary to reduce laws to writing, and accommodate to public and private use. Examples given from history of nations which laid down precepts to guide the public good. Codification followed, especially among the Romans. Julius Caesar's Code frustrated by his death. Private Jurisconsults codified, and there came a variety of codes down to Justinian's Digest, on which this work is a commentary; the author illustrating, amending, improving, widening it, by a comparison with the law of Holland.
2. What laws should fail before we can refer to Roman or Canon law. In case of controversy, first consult municipal law: then the non-written law and customs: then the Roman law and the Canon law, i.e., the Roman law where not in disuse, as it is, e.g., adoption, slavery, manumission, and where undeviated from by statute. In Aesdomio successions, refer to Roman law, its prototype, but in Scabinican to law of Holland and Zeeland. If our own laws and customs fail, refer to just laws and customs of neighbouring countries. Failing all other aids, fall back on natural equity and sound reason.
3. The accurate knowledge of the Roman law is nevertheless desirable.
4. Jurisprudence defined. It is called a knowledge of things divine and human. It is a philosophical study, and a divine study, as shown by many examples cited in the text.
5. The *bonum* and *æquum* (i.e., the good and the just) should not be separated, according to our law. Jurisprudence is the rule of the *æquum et iniquum*;—note, the *bonum et æquum*, for the *bonum et æquum* cannot be separated, as some of the ancients strove to do, nor the *ingenium magnum* (great intellect) from the *bonum*. Judgments, exceptions, restitutions must rest on the *bonum et æquum*, which is therefore their foundation; although either may cease under particular circumstances. Thus, a. The Emperors allowed a husband to whom his wife committed herself, to administer her dowry, but not to alienate it without her consent. b. We must restore to a thief what we receive from him on deposit, unless the owner appears to claim it.

6. In what sense it is true that equity should be preferred, in deciding, to strict law. The *leges* and the *jus scriptum* are founded on equity both in their original inception and subsequent change. Sometimes they have, in cases unprovided for, to be extended to like cases, on equitable principles rather than those of strict law or very refined construction. The Judge should follow equity in construing the written law, and not be bound too strictly by its words in opposition to its sense, *e.g.*, it was death by Roman law to ascend the city walls, but surely not if the object be to repel an enemy? Nor, on the general principles of an "action to produce" would it be equitable to enforce a student to produce his books of study. The Princeps exercises clemency and pardon. The Judge decides according to the law, if plain, leaving it to the princeps, or legislator, to alter where it is evidently harsh.
7. Why Justice is defined on the basis of a desire. The aim of Jurisprudence is Justice. Justice defined: "the desire to render to everyone his own," which is the foundation of justice, is not the desire *e.g.*, of the thief, robber, or *malâ fide* possessor, who restores by order of the Judge; and yet it may be present with one who, by misfortune, shipwreck, fire, or enemy's inroad, cannot pay his creditors as he would wish and yet hopes to do. Distinction between a just or unjust action, and that is which is justly or unjustly done:—a thief, forced to return his spoil, does a just action, but does not act justly, for there was no intention to do so. An insolvent debtor does an unjust action, but does not act unjustly, for it arose through misfortune.
8. Why Justice is said to be the constant and perpetual desire. The infirmity of our nature does not allow this desire to be perfect or continual: that would be divinity: still the standard to which we aspire must be that of a desire thus perfect and continual. A change of law from time to time does not show a change of this desire, or of justice, for laws differ with the differing condition of men and times. They are but the mantle of Justice. The mantle does not change the man; so with Justice. The true man is ever constant to the law as it stands.
9. The division of Justice into commutative and distributive; and what proportion is observed in each. Justice is, *a.* Commutative. *b.* Distributive.
 - a* refers to commerce. Arithmetical proportion used. The subject matter regarded, not the person: unless the equality of former being evenly balanced you decide by the person. Thus, equal price being offered by owner of *emphyteusis* and a stranger, prefer owner: at public auction, prefer cognate to creditor, creditor to stranger: partner to stranger, in partnership divisions.
 - b* refers to rewards and penalties. Here the person is regarded, as a rule. Geometrical proportion is observed. For same crime, one more punished, other less. So with rewards. Fines varied according to sex and condition among the Romans: so in law of Holland.
10. The division of Justice into expletrix and attributrix: and how every thing which is lawful is not honourable. The division in the last § is very similar to that of Grotius: *i.e.* *a.* expletrix, *b.* attributrix.
 - a.* That to which persons are bound in equity and natural reason, but can be forced to by law; *e.g.*, rights of ownership, obligations by contract, quasi contract, and delict.
 - b.* That to which persons are bound in equity and natural reason, but can not be forced to by law, *e.g.*, rich supporting poor; reward good-doer; give gifts for gifts; give counsel to those without it: inheritances and legacies given to nearest, and those deserving by respect and good offices.

Not all that is lawful is honourable. Many laws declare things lawful the contrary of which they would prefer.

1. Conditional sale of wine, allowing it to be thrown out by seller, who is yet commended if he conserves it for buyer.
2. Concubinages approved: and yet lawful marriage preferred and encouraged by the Romans.

11. What law is in its varied sense, and from what sources it is collected. *Juris consults* should not merely contemplate Justice in the abstract, but apply it practically to the circumstances of life, as Judges or advocates. The law in this sense is but a rule or standard of action, as is variously defined by authors cited in the text. Whether it be public or private law, the law of nature, of nations, or of the State, its precepts are, to live honourably, injure no one, and render unto everyone his own.

12. Natural law defined: "what nature teaches all animals." For it is admitted that brutes have no capacity of right or wrong, but they have instinct, its shadow. The poets have fancifully attributed customs, etc., to bees, and the philosophers, anger and other mental attributes to ants.

13. Not all that a man does, however, is right, or founded on the law of nature; he may merely follow brute instinct. Otherwise incest, adultery, lawless violence, would be allowed. It is only right where right reason guides.

14. Some rashly deny that there is a law of nature, saying there is no law giver, no penalty; I will not trouble to argue against this, for God is the author of nature and the natural law. Its observance brings us benefit, its non-observance misery.

15. What is the first principle and foundation of natural law? The foundation and first principle of this natural law have been variously described. *a.* Some place its foundation on its agreement or disagreement with natural and social reason, undepraved, but this begs the question, for what is incorrupt nature and right reason? *b.* Others on the social character of mankind, but wrongly, for natural law includes not only our duty to our fellows, but to God, and to ourself, when far removed from society. Besides, the natural law is older than society. God is its real foundation, the knowledge of Him as a Parent, fear of him as a Master, love of him as a Father, without superstition. It teaches us love of parent and of country; to respect and protect ourselves, using and not abusing our means of support; to cultivate society, on the members of which we are variously and mutually dependent: to procreate and educate children, promote community of life, helping and being helped. Hence we must do to others as we wish that others should do to us. We may guard and defend ourselves against thieves; robbers, enemies, and against the violence of others, meeting violence with violence, even killing the aggressor, if life or honour cannot be otherwise maintained.

16. The law of nature, being divine, is immutable; for God cannot change.

17. This is in theory, but in practice it may be mutable under exceptional circumstances. In theory it forbids homicide, yet one can kill a robber using violence, and judges can order executions. Besides in many respects the law of nature advises but does not command, and then, in just cases, you can depart from its suasion. In early days, too, there was full freedom, and community of goods; but as society grew, and wars waxed, came individual ownership, and slavery.

18. The law of nations defined. Divided into *a.* Primæval. *b.* Secondary. The former is the law of nature adopted by nations, embracing worship of God, obedience to parents and country. The latter is what the changing circumstances of nations require from time to time to

be accommodated to their growth; thus exchange first came into force; then money, then purchase, then letting, then loans for a time or at pleasure, then lending and borrowing, then pledge, for greater security of one's capital let or lent, then mandate, deposit, partnership. Some nations adopted these forms of contracts: others not. It was a purely optional matter. For instance, Holland does not approve slavery or manumission. Under the law of nations falls the sending of embassies, the formal proclamation of war; the sending of hostages and ambassadors to make peace, and their recognition or non-recognition, at pleasure, by different nations disposed, or not disposed, to recognize them, as the case may be.

19. But all a nation introduces into use contrary to reason is not founded on the law of nations, but rather on an abuse of it.
20. The civil law defined. It exists either *a.* By origin, which is not directly founded on the law of nature but on a general equity, e.g., wills, public solemnities, *Falcidian fourth*, *Senatus Consultum Macedonianum*, *Velleianum*, and other Roman laws. *b.* By approval, established by natural reason, or adopted from other nations.

1. As often as, with careful contemplation, we may choose to study the primordial condition of the human race, its increase, and its prolonged duration onwards to the present day, we will find that in no place, and in no time, did it exist without laws regulating the right and the honourable. Not even in those regions, nor in those ages, when savage mortals were ignorant of all the practices of a more cultured life, when herbs and acorns were their food, the forest their home, and when the wife, dwelling in the mountains, strewed the woody couch with leaves. And although, through the fall of our first ancestors, there perished, with primæval integrity of morals, also the exact use of an incorrupt and an infallible reason in all things, still neither mental vigor, nor the sense of virtue, was ever so wholly lost to man that some sparks of the principles of what was just and honourable did not survive; like the ruins of some splendid mansion, or the timbers saved from some shipwreck. Thus there remained over in the hearts of men some remnants of an imprinted, inborn, divinity: some rules of justice and equity, divinely engraven and inborn: dictating unto each one what was lawful and what was unlawful, what to do, and what to avoid. Each one discussing these rules within himself, with a sedate mind, and cogitating over them with himself, could not fail to recal them, though by strength not his own, since not merely did the sacred writings point them out to him, but also the teachings of the best and most learned of mankind. For to them it seemed that the recollection of a life well spent, and deeds well done, is very pleasant to good men, and makes them fear nought, since they are unconscious that they have ever committed any crime. Thus in adverse moments, too, they feel the consolations and present joys which their easy minds minister to them. The wicked, on the other hand, are ever pricked by the consciousness of their misdeeds, armed as it were with a scourge against their improbity; and are agonised with the terror of penalties ever flitting before their eyes. And although the love of virtue, and of the true praise which is its consequence, ought to allure everyone to act aright: although very many men believed in a genius of their own, a tutelary

God, given to them when first born, the future mystic guide of their whole lives, the divinity guiding aright all human actions: still experience, the mistress of all ages and peoples has constantly testified that mortals have notwithstanding this not lived perfect lives, pure from evil, but that everyone's mind was rather inclined to all things impious and unjust,—seeing and approving the better course, but following the worse. Lest, therefore, every man should be led away by so depraved an instinct, spurning the dictates of right reason and an uncontaminated mind; transgressing, according to his own libidinousness, the bounds of what is right and equitable, whether as regards his public or private duties; lest by recourse to endless disputations, full of conflict, and by sophistical arguments the result of intention or error, he should take these as guides for himself and others, and establish, from out the fixed principles of good and evil, limits which were uncertain, erroneous, varying according to his own heed and aim, colouring them moreover with a show of equity: lest these things should happen, I say, it was necessary not merely to confirm the aforesaid inborn rules of right and wrong, the universal dictates of the natural law, by having written laws for each nation's use, but more especially to accommodate them to the moral actions of men in common life, so that the more certain and uniform principle of justice pervading the community might exist also in the individual: rewards being added to incite virtue, and penalties to deter vice. As to which Cicero says excellently in his *De Oratore*, Book 1, cap. 43: "from these (viz., the laws) we see that very great dignity is to be sought; for the true, the just, and honest labour is adorned with honors, with rewards, with splendour; the vices and frauds of men are punished with penalties, ignominies, chains, stripes, exile, and death; and we are taught, not by endless disputations full of strife, but by the authority and at the nod of the law, to have our passions under control, to coerce all our lusts, to protect our own property, to keep our minds, our eyes, our hands, from what belongs to others." Hence it is that among many of the more ancient nations, whether those celebrated in historic record, or in the partly fabulous narrations of the poets, we find very many conspicuous for the glory of their jurisprudence and their study of equity: nations whom the popular ambition did not raise above other nations, but a studied moderation ranked amongst the good; nations which noting how full of danger and confusion it is when a country was ruled by an uncertain law, and how very lamentable the issue of such a state of things, laid down precepts peculiar and suitable to the genius or requirements of their citizens,—precepts which would serve as aids and safeguards to inferiors, and reins to the superior, and according to which every one would be allotted what was his own. On this certain basis Saturnus once fashioned the people of Latium by his laws, Bacchus the Indians, Italus the Ænolians; in like manner the Corinthians owe their institutions to Phidon, the Milesians to Hippodamus, the Lesbians to Macarius, the Getans to Zalmolxis, the Egyptians to the thrice great Mercurius: and it is long since known from the leading writers on antiquities that Mino gave to the Cretans the laws by which they were ruled, Arumba to the Epirotæ, Philolaus to the Thebans, Zaleucus to the Locrians, Draco and Solon to the Athenians, and Lycurgus to the Spartans. That the Romans were the first authors of law, ancient but simple, far removed from all ambition, favour, hatred, partiality, or corruption, you will nowhere better learn than from Tacitus, who

says in his *Annals*, bk. 3, cap. 26, 27: "Romulus ruled us at will; then Numa bound the people by religious rites and a divine law; some laws were made by Tullus and Ancus; but more especially was Servius Tullius, the author of laws, which even the kings obeyed. When Tarquinius was driven away, the people made many laws against the factions of the fathers, for preserving liberty and cementing concord; and when the Decemviri were created, the "Twelve Tables" were composed, gathered from wherever there was anything excellent to find,—their aim an equal law." But the industry of the leading men and jurists of the Republic did not stop here; nor could it, regard being had to the need of the people. For when, with a change of times, and of men's manners, the laws likewise began to change, new laws to be added to the old ones, and the laws as a whole to increase in bulk, men began to think about a certain "*art* of law" as we may term it, or at all events of its methodical digest, lest a confused chaos of law should be the result. Hence, confining ourselves now only to the Romans, Julius Cæsar first of all, as we find from Suetonius, in his life of him, cap. 44, determined to "reduce the civil law to a certain method, and from an immense and diffuse store of laws, collect the chief and best laws into a very few books." But when his death prevented his meditated execution of this plan, from that time forward many private individuals systematised the laws and constitutions for their own use, and for the use of others. This is abundantly shown not only by the Gregorian and Hermogenian codes, but by the volumes of different *juris consulta*, whether published as the *Institutes* or the *Digest*, the memoried name of which our *Pandects* still preserve. In these *Pandects*, besides innumerable other excellent monuments of jurisprudence not to be despised, we find parts taken and collated from the *Institutes* of Ulpian, Marcian, Gaius, Florentinus, and others, and from the *Digests* of Julianus, Alphenus, Marcellus, Celsus, and many others. That the Emperors themselves were more tardy in issuing books of law on public authority is evident, if we except Hadrian and Theodosius the younger, the former of whom was the author of the perpetual edict, and the latter of the Theodosian Code. Until, at last, Justinian bending his energies thoroughly to remodelling the Roman law and reforming it for the better, not only brought the most sacred constitutions of the Emperors into excellent consonance, but directed his attention to the numerous volumes of the olden jurisprudence, selecting from them the most useful fragments: (Tribonian adding to or detracting from them, so as to accommodate them to the requirements of the times). Justinian thus gave to the world his celebrated work, the *Pandects* or *Digest*. It truly is the most holy repository of the entire Roman Jurisprudence, and abounds in the most precious treasures which have been gathered, through many centuries, from the fountains of the just and equitable, by the best priests of the Law, illustrious for their culture of, their veneration for, a justice and wisdom which were neither simulated nor affected. And I have thought that it would be labour not ill-bestowed if I should illustrate its fifty books by a commentary, and also add to the definitions of the Roman Law, mention of whatever was amended in, or added to it, or of wherever it was aided by a more liberal interpretation, according as to our own or neighbouring nations it seemed fit so to do, on account of peculiar reasons urging them. To omit to do this would be to deprive any explanation of the Roman Jurisprudence of much of the desired good,

as will be evident to anyone who reflects that laws also have their age and destiny : that what once was considered unlawful, has since come to be regarded as lawful, and on the other hand what was formerly forbidden, is now allowed to be done without reproach, as I have more fully explained in my oration "On connecting the knowledge of the Roman and Modern Law." And, as another reason, it should further be remembered that in settling controversies among litigants, the foremost places is now no longer wont to be given to the Justinian Law.

2. Wherever there is a controversy between two or more persons, we must first of all see whether it has not been settled by the words, or by the intention and meaning, of the written municipal or provincial law. These being wanting, we must have recourse to the unwritten laws, the established customs of the country, to which we must add the ancient paræmiae or proverbs of the nation, confirmed by the long use of the people. *l. si chorus* 79. §. *his verbis* 1. ff. *de legatis* 3 (i.e., *Digest* 33. 1 and 2. l. 79. § 1.) : *l. solent* 6, §. ult. ff. *de offic. procons. et legatis* (i.e., *Dig.* (l. 16. 6.) *Ant. Mattheus tract. de paræmiis Belgarum Juriscons.* If the question at issue cannot be settled from these sources, then only are the decisions of the Roman Law, and the illustrations of the Canon Law to be admitted, as has been observed by *Eguinarius Baro* on the title of the *Institutes de Justitiâ et Jure* n. 3 (i.e., *Justinian's Institutes* 1. 1.) : *Zoesius ad Pandectas tit. de legibus* part 2, *de consuetudine* num. 25 et seqq. : *Lambertus Goris adversar. tract.* 4 § 1. : *Sim. van Groenewegen ad præm. Instit. num.* 1 et seqq. My father *Paul Voet, Tract. de usu juris civil. et canonici* cap. 5. *Abrah. à Wesel ad novellas constit. Ultrajectini* art. 10 num. 10 et seqq.

But note that we cannot even have subsidiary recourse to the decrees of the Roman law whenever it appears that by universal custom this or that branch of Roman law has fallen into total disuse ; for example, with regard to adoption, slavery, manumission. Although statutes have enjoined anything generally, or custom has introduced it, the Roman law ought to be admitted where there is no decision. *Gudelinus de jure noviss. lib.* 1, cap. 13, almost at the end. Nor is that axiom of constant application which says, *what is omitted in a statute must be supplied from the civil law, and decided according to it.* This maxim has only force if the civil law has been at one time received on that particular subject matter, and certain additions are found made to it by statute or deduction made from it. For if the object of the statute has evidently deviated from the fundamental principles of the Roman law, what is wanting can with less safety receive its supplement and definition from the Roman law *Hugo Grotius, in Responsis Juriscons. Hollandorum* (i.e., *Dutch Consultations*) Part 3, vol. 2. *Cons.* 197, num. 14 et seqq. Therefore it also is, I think, that the Courts of Holland, having remodelled both the Scabinian and Æsdomic law of succession, laid down that in the Æsdomic, as more especially resting on Roman law principles, recourse was to be had, in undecided cases, to the maxims of Roman jurisprudence ; but that, in regard to the Scabinian law, what was wanting ought to be decided upon by the ancient law of succession of Holland and Zeeland. Whence it has been laid down by some, nor wrongly, that when the customs of any country are obscure or uncertain, we may not imprudently inquire into the usages and customs of neighbouring places. For although it is true that the laws of one territory do not exert their force in other places beyond that territory, and are so far of strict application, and although we

cannot argue or infer from the custom of one place as to the custom of another place. *l. ult. ff. de jurisdictione* (Dig. 2. 1. 25:) *Jacob Copen observat.* 31. num. 18, 19; still this does not prevent us following in our judgment the maxims of neighbouring nations where they are founded on reason, as examples or decisions prudently arrived at, provided we are ourselves destitute of laws and customs. Nor is it an unknown thing that one people should borrow laws from another people, of their own free will, as laws which are equal and just. Many a law was approved by the Romans which had formerly pleased the Greeks: and sometimes the nobles of Zeeland, as well as of other provinces, adopted with repetition of almost the very same words, the Statutes made by the Counts of Holland, for the benefit of their own citizens and the public good. Compare *Placitum Ord. Holland.* 16 December, 1595. vol. 1. *placitor.* pag. 482. with *placito Ord. Zeeland.* 19 Julij 1607, d. vol. 1. pag. 495, item pag. 491. cum pag. 502: *Groenewegen ad d. proœm Institut. num. 16 et seqq. ibique DD. cit.* To which we must add that in every case where the customs of neighbouring regions are wanting, we must have subsidiary recourse to natural equity and right reason. *Busius de officio judicis cap. 5. num. 54. et seqq.*

3. But still what I have so far said does not render an accurate knowledge of the Roman Law nowadays unnecessary; nor take away from the necessity of still learning those branches which too imprudent or less skilled persons rashly assert must be unlearned, because abrogated in the Court practice, as I have shown by many examples in my oration "*on joining the knowledge of the Roman and Modern Law.*" Nor do I wish to be the only witness of this. There is the testimony of *Aria Pinellus ad. l. 2. C. de rescind. vendit. part. 2. cap. 4. num. 2.* "I," says he, "after a long course of reading, and after the most diligent work done in Court, am of this opinion, that theory without practice cannot give a solid, digested, knowledge of the law; that practice without theory proves very dangerous and deficient." Hear *Baro ad tit. Institut. et Just. et Jure*, where he says, "There is nothing in the Roman Law which the Frank pragmatics cannot apply to the use of the Courts, and their judicial proceedings. I will show this in a few words in particular titles. Too often have I heard it said in the schools that this or that title is of no force with the Franks, whereas often the effect and power of the title was unknown, or else those who thus spoke in the *gymnasia* knew nothing of Frank law, save from hearsay." Add to this the authority of Imbertus, Mornæcius, Rebuffus, Antonius Faber, and others, whose emphatic words Antonius Matthæus cites in his accomplished work *De Judiciis*, after its preface.

4. Jurisprudence, treated of in this volume of the Pandects, is "the knowledge of things divine and human, the science of the just and the unjust, or the art of the good and just: a true and not a simulated philosophy," as we learn from Ulpian and the *Institutes l. 1. pr. and § 1; l. justitia 10, § ult. ff. h. t. (i. e. Dig. 1. 1. 10. § 1, Institut. h. t. (1. 1.))* And it is deservedly so-called. For who will not accord the title of philosophy to that art which is the teacher of all the virtues, which excels both in public and private duties, and causes the State, if nothing prevent it, to be constantly, strongly, and skilfully administered: an art on the basis of which States become so renowned that in them either Kings philosophise or philosophers are Kings. Who will deny that Jurisconsults are employed about divine things; who recollects that the public law, as

Ulpian tells us, anciently stood connected with sacred things and the priests. *l. 1, § 2, ff. h. t. (i.e. Dig. 1. 1.)*: *Rævardus, Variorum libr. 5. Cap. 12*, almost in the beginning. Manlius Torquatus therefore, according to Valerius Maximus, *lib. 5. cap 8, num 3*, is said to have been most skilled in the civil law and in the sacred pontificals. Draco the Athenian, Attæius Capito, and Cocceius Nerva are said to have known all law divine and human, according to Gellius, *Noctes Att. lib. 11, cap. 18, in pr., and Tacitus Ann., lib. 3, cap. 70, et lib. 6, cap. 26*. Yea, very often those on whom was imposed the duty of administering justice, also anciently had the care of sacred things; and it seemed meet to the nation that those who held the reins of the whole empire and of the public rule should also have the highest authority over divine things, as Servius witnesses regarding the verse of Virgil, book 3 of the *Æneiad*, where he had spoken of Anius both "as a King of men and a priest of Phœbus," Servius adding "that this was the custom of our ancestors that the King was likewise the priest, the chief priest, and that hence now-a-days the Emperors are also called chief priests." This is also manifest from *Dio Cassius, lib. 53, my paging, 508, and from § 8. Inst. de rer. divis. (i.e., Just. 2. 1.)*, taken in conjunction with *l. 9, § 1, ff. eod. tit.* Cicero further testifies to it in his *pro domo*; addressed to the Pontifical College, where he says: "though many things were divinely invented and laid down by our ancestors, none was more excellently so than that they both willed you to preside over the religious rites of the immortal Gods and also of the Republic: so that, the greatest and most celebrated citizens governing the Republic properly, and as priests wisely administering religion, they might conserve the Republic." Witnesses thereof are also the ancient customs of the Gauls, and the functions of the Druids among them: they, according to *Julius Caesar lib. 6, de bello Gallico*, "presided over things divine, made public and private sacrifices, were interpreters of religion: a great crowd of young men went to them for the sake of learning, and they are held in much honour among us, for they decide on nearly all public and private controversies, and if any misdeed is committed, if murder is done, if there is a controversy as to inheritances or boundaries, they settle it; they fix also rewards and penalties."

5. Although it is incumbent on Jurisconsults, who cultivate justice to separate the "just" from the "unjust," the "lawful" from the "unlawful," *l. 1. § 1. ff. h. t. (Dig. 1. 1.)*, yet neither the civil law nor natural reason sufficiently allows us to separate the "good" from the "just," any more than to distinguish a man of "great intellect" from a "good" man: You should not, says Sêneca, think it to be true what is said by that most learned man Livy; "he was a man rather of 'great intellect' than a 'good man': it is impossible to separate these things, either he was good or he was not great." Our law is certainly the art of what is good and just, its priests profess a knowledge of what is good and just, our judges decide from what is good and just, adjudicate, assess, and interpret according to it; an exception "*ex bono et æquo*" lies; restitution is made on that basis, and thus the "*bonum*" is everywhere joined to the "*æquum*" and the "*æquum*" to the "*bonum*." All this is more than manifest from very many passages of our law. *l. 1. pr. et § 1. ff. h. t. (Dig. 1. 1.)*; *§ 3. Instit. de obligatione ex consensu (Inst. 3. 22.)*, *§ quædam actiones 20, § in bonæ fidei 30, in princ. § 31, in fine, Inst. de actione (Inst. 4. 6.)*; *l. in his quas extra lib.*

ff. de condit. et demonstrat. (Dig. 35.); *l. si et me* 32, *ff. Dig. de rebus creditis* (Dig. 12. 1.); *l. non exigimus* 2, § *pen. ff. si quis cautione in jud. sist. caus. factis non obtemp.* (Dig. 2. 11). Nor can it be otherwise than that that which regarded in itself is good, is also on the same basis just, although it may under certain accidental circumstances begin to be "unjust," on account of which circumstances it is then no longer "good." Hence, although the Emperors considered it "good" (I add and "just") that a woman who committed herself to her husband should also allow her dower to be governed at his discretion, still, since she remained the mistress and free controller thereof, they adjudged that it was no longer "just" (nor good) that the husband should interfere with her property, she being unwilling. *l. hac lege* 8 *C. de pactis conventis.* (C. 5. 14.) In like manner where a thing is deposited with us by a thief, it is just and good to restore it to the thief thus depositing it when we so regard it on the basis of a giver and a receiver, that the receiver takes it on the faith of a contract, binding him to restore it to the giver. But if the owner of the stolen thing appear, than whom no one else had stronger rights to the thing, and from whom it was taken away by a most wicked act, then the scene is as it were changed, and it can scarcely be doubted that the thing must, on the ground of what is just and good, be returned to him. *l. bona fides* 31. § 1. *ff. depositi* (i.e. Dig. 16. 3). Which principle Budens, among many others, followed, *l. 1. ff. h. t.* (Dig. 1. 1); and my most illustrious colleague, D. Noodt, *probabilium libr. 3. cap. 2.*

6. Furthermore, that equity is comprehended in the laws generally, and in the written law, no one can ignore who carefully studies the requisites of laws to be narrated in tit. 3. (post), so that a strong presumption of equity assists the law which obtains in the very *argumenta rerum*, or subject matter; and laws require change whenever the stain of a manifest inequity is apparent in them. *l. leges sacratissimæ*, 9. *C. de legibus* (C. 1. 14). But as all points cannot be singly comprehended in the laws, or in the *senatus consulta*, or in any other written law. *l. non possunt* 12. *l. 13. ff. de legib* (Dig. 1. 3), the nature of things accelerates new forms being daily issued, and often matters arise which are not yet determined by the definitions of the law. *l. 2. § sed quia* 18. *C. de veteri jure enucleando* (C. 1. 17). So that what is omitted must be supplied by interpretation, or at least by the functional authority of the Judge, by proceeding from the manifest meaning of the law to similar cases whenever the same reason and conjecture of utility appears to underlie. *d. l. 12. 13. ff. de legibus* (Dig. 1. 3), *d. l. 2. § 18. C. de veteri jure enucleando* (C. 1. 17). It is necessary in defining these to observe equity, and to prefer it to the strict law, and to a too scrupulous subtlety of argumentation. *l. in omnibus* 90. *ff. de reg. juris* (Dig. 50. 17): *l. quod si Ephesi* 4. *in fine ff. de eo quod certo loco* (Dig. 13. 4). This is the special meaning of that saying of the Emperor in *l. placui* 8. *C. de judiciis* (C. 3. 1) where it is laid down "that in all things there should be an especial reason of justice and equity rather than of strict law": and Paulus also says in *l. 2. § item Varus* 5. *in fine ff. de aqua et aquæ pluvi. arcend.* (Dig. 39. 3) while conceding that, an *actio utilis* is there allowed in the kind of act there referred to, adds "equity suggests this, though the law be wanting." And that this was the general intention of the jurisconsults is evident from this also, that where a direct action was wanting according to the

words of the law, they in most cases introduced *utiles actiones* (adapted actions) on the ground of equity. It is even in regard to written law incumbent on the Judge that, in interpreting it, he should follow an especial consideration of equity, and not merely follow the strictness which attaches to the mere words of the law and not infrequently leads to what is absurd and inept. He should rather, after having made himself perfectly acquainted with, and having carefully studied its reason, determine whether, according to his view, the force of the law should be extended to the case to be decided by him; or whether, rather, if the particular reason of the law has ceased, the wish of the legislator himself to extend the law to such a case does not appear to have been thwarted; since to know the law certainly does not mean to follow its words, but its force and power. *l. scire 17. ff. de legibus* (Dig. 1. 3). Thus he is said to act in fraud of the law, who, keeping to its words, acts opposite to its intention and meaning. *l. contra legem. 29. et 30. ff. de legibus* (Dig. 1. 3), and he is also said to pervert, and to strain at words, who does not pay attention to the meaning with which anything was said. *l. pen. ff. ad. exhibend* (Dig. 10. 4). Wherefore Cicero somewhere says "that to follow what is written is the work of a calumniator: the duty of a good judge is to uphold the wish and meaning of the writer." And who, I pray, would consider it just that they should be condemned to death who ascended the walls of the city for the purpose of repelling the enemy, because it is provided by law that it is a capital crime to ascend the walls. Or because the law allows an "action to produce" (*actio ad exhibendum*) to be given to those whose interest it is to enforce the production, that a student of any branch of learning should, by an application to him of this action, be compelled to produce his books of study, on the ground that if he read those thus produced he would be better and more learned. Certainly not merely do the laws order otherwise *d. l. pen.*, but common sense dictates it to everyone; nor was it ever doubted that such an extreme law would deserve to be called an extreme injury and injustice. What has been thus far said will not require proving from the fact that the Principes reserved to themselves alone the right of distinction between equity and strict law. *l. 1. C. de legibus* (C. 1. 14). For that passage in the code may not unaptly be taken as referring to the clemency of the ruler, to his mercy and indulgence, whereby he pardons punishments inflicted or to be inflicted by the Judges in terms of the law: punishments which the ruler alone can remit or lessen, but not the Judge, who can neither affect the glory of severity nor of clemency. *l. perspicendum 11. ff. de pœnis* (Dig. 48. 19). Or it may be understood, in that passage, of a case where the meaning of a severe law is manifest: and then the Judge must decide according to it until the ruler, taking notice of the hardship or iniquity of the law, changes it for the better. For as it is the province, not of the Judge, but of the ruler only, to make the law, so it is his province also to abrogate the law, when once made, on account of a subsequently appearing inequity. *l. leges 9. C. de legibus* (C. 1. 14). To this we must refer the saying of Ulpian in *l. prospexit 12. § ipsa 1. ff. qui et a quib. manumissi liberi non fiant* (Dig. 49. 9), "that it was very hard indeed that a woman who separates from her husband is prohibited from alienating or manumitting all her slaves; but yet the law was so written": therefore, it was thenceforward so decided until the harshness of the law was amended, as indeed it was afterwards amended. *l. in adulterii 32. C.*

ad leg. Jul. de adulter (C.9. 9). Although it is true that rigor and asperity are not infrequently inserted in laws on account of just causes; so that there is then no need of the legislator's mitigation or moderation, but such rigor and asperity must be thoroughly followed in adjudicating. *l. si expressum* 19. ff. *de appellatione*. (Dig. 49. 1.) *d. l. perspicendum* 11. ff. *de pœnis* (Dig. 48. 19).

7. The aim of Jurisprudence is justice, the most perfect of all the virtues, and as it were their joiner together: it is rightly defined as "the constant and perpetual desire to render unto everyone his own." For although, properly speaking, it is a *habit* of desire, still I think that it is not without reason simply described as "the desire," since it is not so much from the occurrence of, and from the actual rendering of what is due to anyone, as much as from the desire itself and the resolve to render it, that acts of justice are to be determined, and to be termed just or unjust. If you separate the wish from the actual rendering of the thing due, you certainly will not arrive at the virtue of justice, unless you are of opinion that thieves and robbers and *malâ fide* possessors do justice when they are really not led by penitence, but act under the authority of the judge, or impelled by the fear that the owner will pursue them, and thus unwillingly return what they have stolen. On the other hand you will not rightly deny the merit of true justice to him who, having by an unexpected reverse of harsh fortune lost his all in a fire or a shipwreck or through incursions of the enemy, is unable actually to pay to others, or to give to them, what is due to them, provided only that he remains ever of intention to give to his creditors, as soon as possible, whatever he acquires when a more favoring fortune smiles on him. There is a wide difference between a just action and that which is justly done, as there also is between an unjust action and that which is unjustly done. A thief does a just action when, compelled thereto, he restores what he has taken away; but he does not thereby act justly, since this restitution does not emanate from a desire to render unto everyone his own. On the other hand, a debtor who does not pay through poverty, does an unjust action, but still he does not act unjustly whenever the non-payment is not owing to his fault, or to an evil intention to do wrong, but to misfortune and accident.

8. Although the condition of fragile human nature does not allow us to be capable, in the highest degree, of having this *constant and perpetual* desire, since to err in nothing, and not to fall often, savors more of divinity than humanity, still this constancy and perpetuity is none the less on that account a *desideratum* in the nature and perfection of justice (which perfection should be kept in view in everything): so that whenever the interruption of this wish is apparent, the absence of justice also becomes immediately apparent. Nor should anyone argue, from the fact that he sees laws daily changing, and that many things once unlawful are now allowed, that there is therefore a necessary mutability in justice and the desire to do it. Let him but reflect that the laws which are but changeable with the variety of times, and of men's manners, bear no other relation to justice than that of being, as it were, its vestments by which it is covered. As no man is altered by their change, however frequent, neither is justice thereby altered. For a just man tenaciously preserves this purposed and constant wish to render unto everyone whatever the public laws, framed according to the time and to the people, and kept in fresh observance, determine should be rendered to him.

9. Justice is commonly divided into commutative and distributive. Commutative justice treats of articles of commerce: in it what is called the arithmetical proportion is observed, when there is only a comparison of thing with thing, and the equality of the things compared is regarded, not the equality of the persons between whom the transactions stand and the agreements are entered into, viz., whether plebeians or nobles, magistrates, or private persons. Unless the equality of the things is in every way balanced, so that the one thing cannot be preferred to the other, for in such case our law has laid down that, as a subsidiary mode of then removing doubt, we may judge by the condition of the person whether the one is of more authority than the other. Thus how must we decide where an equal price is offered, for a thing capable of sale, both by the direct owner of an emphyteutical thing and by a stranger: in a public auction both by a cognate or creditor, or a creditor or a stranger: or by a partner and a stranger, where an action for the division of partnership property is pending: or where there is a question as to the portion of a debt to be remitted to an heir when he is invited to adiate, the creditors who differ being equal in number and value. In the one case you must follow the wish of those who are of greater dignity. In the other case you must prefer the partner, the creditor, the cognate, the direct owner, to the stranger, and the thing must be awarded to such partner, creditor, cognate, or direct owner, said the Romans. *l. juris gentium* 7. § ult., *l. 8. ff. de pactis* (Dig. 2. 14.), *l. ult. C. de emphyteusi* (Dig. 42. 5.), *l. 1. C. communi divid.* (C. 3. 37.); *l. cum bona* 16. *ff. de rebus auctorit. jud. possid. et vendendis* (Dig. 42. 5). Distributive justice is that which treats of rewards and penalties awarded to each one according to merit. Thus the ancients made Nemesis the daughter of justice, calling her thus ἀνὸ τῆς ἐκείνης διαμετρώου, the avenger of impious deeds, the rewarder of deeds which were good. In this division of justice respect is had to persons, not always, but still often, and thus is observed the proportion which is called geometrical, as the civil and municipal laws dealing with the punishment of delicts everywhere say, as is shown in their proper places. Thus for one and the same crime committed by two persons the one receives a heavier, the other a lighter punishment. Or for a like deserving action the one receives a greater, the other a less reward. Regarded in themselves as punishments or rewards they are unequal. But regarded as apportioned to persons differing in age, in birth, in dignity, in sex, they are equal, inasmuch as a punishment which is *per se* lighter does not burden the more honorably born man more than the heavier penalty does the more humble. But civil pecuniary fines and penalties are imposed by law in a certain fixed scale upon all of whatever sex or condition, or dignity, promiscuously. This was not infrequent with the Romans, as in thefts, rapine, damage given by wrong-doing (*damnum injuriæ datum*) and in many other cases: that it is also not alien to our modern law is commonly known. *Anton. Matthæus de criminib. lib. 48. tit. 18. cap. 4. num. 7.*

10. Not much different from this first division of justice is that which Grotius has distributively made, viz., expletrix and attributrix, in his work *de jure belli et pacis* libr. 1. cap. 1. num. 8: see also the commentaries of the most noble Willem van der Meulen on Grotius d. l. 8. Under expletrix are included all things which one is not merely bound to give and fulfil from reasons of equity, but which, when unwilling, he can be compelled to give or fulfil by competent legal

remedies. Thus there are hereunder classed not merely all things due to us by the law of ownership (taking the words "due" and "ownership" in their widest sense), and by obligations arising from pacts and from real and quasi contracts; but also those which everyone owes to the public or to private individuals, by way of penalty for delict committed: where *volens volens* one is compelled to restore, to give, to furnish, to do, or to pay a penalty. On the other hand the term attributrix is applied to all those things which one may be bound to do according to equity and natural reason, and doing which he may be thought worthy of praise among good men, yet which, if he refuse to do them, thus laying aside shame and spurning the bonds of equity, no public authority can force him to fulfill. Thus although it is right and becoming that the rich man should extend his charity to the poor man; that the deserving man should receive a reward; that a donor should receive donations in return from the donee; that the wiser man should help one wanting wholesome advice; that inheritances should be given and legacies left to those nearer in relationship and to others who, by respect shown and good services rendered, had won a hope of such succession; yet if anyone neglected offices of this nature no law can force one who is unwilling, to give rewards, charities, inheritances, or legacies. And this it is which Seneca means when he says in his work *De Irâ*, lib. 2. cap. 27. "What a difficult innocence it is, to be good according to law, how much wider is the rule of duty than of law: how much piety, humanity, liberality, justice, good faith demand which is yet beyond the public laws." And the jurisconsult Paulus maintained "*that not all that is lawful is honorable*," *l. non omne* 144 *ff. de regulis juris* (Dig. 50. 17.). For many things the laws pronounce to be lawful, altogether the opposite of which they yet advise and far prefer. When wine in cask is sold on this condition that it shall be removed before the following vintage, if the buyer do not remove it the law gives the seller the power to throw it out: but if he do not throw it out, but resell it at the risk of the purchaser, or if he bestows his labour on it in any other way so that the wine is thus conserved for the use of the original buyer, and so that any delay in taking delivery shall be as little injurious to him as possible: such conduct on the part of the seller Ulpian declares to be the rather commendable in him. *l. 1. § 3. et 4. ff. de peric. et comm. rei vend.* (Dig. 18. 6). Concubinage the Emperor declared to be a lawful custom. *l. si qua illustis 5 C. ad senatus Cons. Orfitian* (C. 6. 57). That it had acquired its name through the law, and was therefore beyond the penalty of the law, Marcianus declared *l. in concubinato* 3. § *ult. ff. de concubinis* (Dig. 25. 7.). Yet that the bond of honorable marriage, confirmed by the consent of the contracting parties and the testimony of friends, is everywhere preferred and praised, and that Roman citizens are urged to it by the granting of certain privileges, is admitted.

11. But do not let anyone think that jurisconsults should stop at, and grow old in, the mere bare contemplation of justice, for this is not sufficient to direct and preserve civil life. More is required from them, that they should apply the law to particular transactions and things, accommodating it to them as they arise, by either performing the duties of judge or advocate, *l. 1. § 1. ff. h. t.* (Dig. 1. 1.). For Jus or law in that sense is nothing else than a standard and rule of action, or "a rule of moral action, obliging us to do what is right." As Grotius says in his *de jure belli et pacis* lib. 1. cap. 1. num.

9. on *Cicero lib. 1. de legibus*, it is "the highest reason implanted in our nature, which orders what is to be done and prohibits the opposite." Or it is "the prosider over evil and good, the teacher of what must be done, the prohibiter of what must not be done," as is said by *Chrysippus Marcianus l. 2. ff. de legibus (Dig. 1. 3.)*. Whether it primarily has reference to the condition of the republic, or the benefit of individuals,—the former of which is called public, the latter private law; collected from natural precepts, or precepts of the law of nations, or of the civil law, whose general tendency is that, "everyone should live honourably, not injure another, and render unto everyone his own." These are generally termed the three precepts of the law, comprehending within their range what has been everywhere laid down by the law.

12. The Natural Law, as defined by Justinian and Ulpian is "that which nature has taught to all animals," *pr. Inst. de jure natur. gent. et civil. (Inst. 1. 2.): l. 1. § 3. ff. h. t. (Dig. 1. 1. 1. § 3.)*. For although, properly speaking, brutes are neither capable of right nor wrong, as Justinian admits *pr. Inst. si quadrupes paup. fecisse dic. (Inst. 4. 9.)* yet we discern a sort of shadow, image, or analogy of law in them; in so far that what men do from dictates of natural reason, if the brutes also do that from a natural instinct, although without a feeling of reason, they are said to do so *jure*. In almost the same way in which not only the poets, by a poetic license, have accorded to the bees customs, desires, peoples, kings, but in which even philosophers and orators have spoken of the anger of the ant, and its other feelings also, giving it even mind, reason, memory. *Cicero lib. 3. de naturd Deorum* says: "do you not think that the ant is to be preferred to this very beautiful city, for in the city there is no sense; in the ant there is not merely sense, but mind, reason, memory." Although in his 1st book of "the Offices" he denies to brutes reason and justice, properly so called. Seneca said excellently in his book on *Anger lib. 1. cap. 3*, "the mute animals have not human affections, but have impulses which are similar: otherwise if they had love, they would have had hatred; if they had friendship, they would have had strife; if they had dissension, they would have had concord; of these there exist some traces in them: but good and evil are the properties of the human breast. To none but man is given prudence, diligence, reflection; animals have neither human virtues nor vices."

13. You will not however rightly conclude from this that everything that man does is just, or according to natural law, although he is clothed with reason, where brutes act in the same way from instinct; unless you think that incest, adultery, wandering lust, violence done without cause, and the like, are tinged with a specious colour of natural law; for all these things are openly done by the brutes: "*Coeunt animalia nullo cetera delectu, nec habetur turpe juvence ferre patrem tergo.*" No, rather, as the likeness of all characteristics which are properly regarded as belonging to the natural law do not appear in the brutes, so only those points which men have in common with the brutes will deserve the name of the natural law, if in men they proceed from the dictates of right reason, for the natural law of men is nothing else than what natural reason dictates to those who have real understanding, and that without any previous effort of the mind, but which they assent to as just, as matters of necessary and evident consequence, without any prolix argumentation or intervening difficulty of conclusion. Provided that the subject of this natural reason is a man of intelligence, using

his reason, having, it may be, a common instinct with the brutes in regard to his body, but a right reason dwelling in his mind, which reason he has in common with his God. *Rævardus lib. 1. varior. cap. 1.*

14. Whether to Nature should be accorded any law, as some rashly think should be denied, on the ground that there is no lawgiver for such a law, nor a penalty for its transgression, I will not discuss at length. It is enough that God, who is the author of nature, is also the founder of the natural law: that the "sanction" for observing its precepts consists in the advantages which accrue to each individual from its observance, and, on the other hand, in the troubles and miseries to which they are exposed, who follow and approve what is contrary to its rules. See *Cumberland de legibus, naturæ in prælegominiis § 13. 14. et seqq.*

15. But what is the first basis of this natural law, what its foundation, what its first principle, from which we can *a priori* (as they say) proceed to demonstrate its existence, and as it were deduce from the most sacred inner chamber of justice what should be ascribed to natural law, are questions on which there has been no less difference of opinion than there was of old when the philosophers varied so much on most points as to the "greatest good" (*summum bonum*). There are those who place its foundation in its agreement or disagreement with rational and social reason, not depraved by the fall. *Grotius de jure belli ac pac. lib. 1. cap. 1. num. 12.* But what, I pray you, is it "to beg the question" (*principium petere*) if this is not doing so? For the very question in dispute is whether this or that is consonant with incorrupt nature or right reason: so that therefore the answer should be deduced from another foundation. Others seek the beginning of all natural law in the social fellowship of man. *Puffendorff de jure natur. et gentium, in præfat.* But not rightly, I think; for the natural law does not merely include in its scope our duties towards other men living in the same society, but also towards God, and oneself, even when removed from all relation to human society. Add to this, that the natural law is older than all society: wherefore society which is of later origin cannot be taken as the foundation of a law anterior to it in point of time. It will not be denied that religious reverence towards God and his duty towards himself prepares a man, and makes him more fitted for society, nay is the firmest bond of human society: but yet there remains the fact that that social fellowship cannot be the beginning of the natural law, when from that law itself the very principles of such fellowship are to be drawn. It may be admitted that man is an animal sociable by nature: it may be admitted that social fellowship is, in a great measure, a foundation of that natural law which was observed among men after they had already multiplied; but it does not follow thence that sociality is the beginning of the entire natural law, or of all those things which are referable to natural law. This being so, if we very carefully scrutinise every point, no other foundation and fountain of the whole natural law more evidently occurs to us, from which, as from the source of a stream or the root of a tree, the reason of all justice is to be derived, than the law of God our Creator, powerful but at the same time benign and very beneficent towards his creatures. For God, so very good and great, made man himself, and everything else for his use. Man perceiving this with his right reason and judgment, and recognising the benevolence, the wisdom, and the high power of his Creator, could not help being conscious and convinced that he was,

by the very benefit conferred on him at his creation, under a very strict obligation, which bound him to show towards his most benign Creator a feeling of religion and divine worship, of love also, and very humble subjection: so much so, that if spurning this dictate of his good feeling, he hastened to do all that was contrary to it, he would greatly have, (led thereto by well-regulated conscientiousness of mind), to fear him at length as one powerful and able to punish, one whom he had yet been unwilling to love and venerate as the beneficent author of his being. Just as (if we can compare what is highest with what is lowest) a freedman, forgetting the liberty given him, inestimable boon, should repay his patron with insults and injuries instead of honor, love, and respect, he ought then greatly to fear his patron's just anger and indignation and a deserved withdrawal of the benefit conferred. To this that saying of Lactantius tends, that the first foundation of Justice is to acknowledge God as a parent, to fear him as a master, to love him as a father, avoiding all superstition. As everyone owes his own existence, next to his God, immediately to his parents, he cannot be otherwise than bound, in return for the benefit of his birth, to show them all marks of piety and respect, to the utmost of his ability. Whence Pomponius says that combined with our religious reverence towards God is our obligation to obey our parents, and our country as a holy mother. *l. 2. ff. h. t. (Dig. 1. 1.)*. Nor was the opinion of Cicero otherwise when he wrote in the first book of his "Offices," towards the end, "that in every community there are grades of duties from which everyone can understand what he should render unto each: first of all to the immortal gods, secondly to his country, thirdly to his parents, and afterwards, by degrees, other duties to other people." Next to this first obligation towards his ancestors is this other, that, thus made a man by his Creator, and venerating him, he should study self-preservation, and guard against working and co-operating, contrary to the intention of his author, towards his own death and destruction: that therefore he should use those things which he sees supplied to him by his Creator for the sustentation of his life, and never abuse them to his own ruin and loss. Wherefore it seemed to the parent of Roman eloquence that every creature, as soon as born, sought and commended to itself the preservation of itself, of its own status, and of everything conservatory of its status: and was opposed to death and those things which seemed to bring death. And as is self-evident, it can hardly be that anyone, without the assistance of others, can pass his life happily, and protect himself; for no one can know, and get together, all the mechanisms and arts necessary for his own conservation. The consequence of which is, that, nature leading him, he is prone and inclined to cultivate a broader society, and a community of life with others. In order that he might the more enjoy the benefits of that society, it was necessary that as in the first place he had studied his own preservation, so, in the second place, he should study the conservation of the whole human race, by procreating and educating an offspring, and thus supplying the gap caused by his own mortality, since, as Cicero says, *lib. 4. de finibus*, "all nature wishes to be her own conservatrix, so that she may be both safe herself and be conserved in her own kind." Also by collecting and providing everything which seemed suited to promoting and strengthening the community of life thus introduced amongst men. And as everyone's own reason and common sense abundantly dictates that that community would be destroyed entirely

if everyone regarded nought but his own, and his present, utility, or (which is worse) if he should arrogate to himself a sort of pretended right over all persons and all things according to his strength and power,—it could not be otherwise than that by, on the contrary, reciprocating with others the offices of humanity, giving to others what was beneficial to them, receiving in return from others what he thought necessary for the preservation of life, he would more and more bind the common chain of companionship and society. Seneca, having this in view, says in lib. 1. "On Anger," cap. 5. "Man was born for mutual assistance, for human life consists in benefits and concord, nor is common help worked into a bond by terror but by mutual love." And again in lib. 2. of the same work, cap. 31. "that all the members agree among themselves that because it is of common interest, individuals should be preserved, hence men spare individuals because we are born for combination : society cannot be safe unless in the love and care of its parts." And hence arise those general principles of the natural law, that no one should do to another what he would not wish to be done to himself, and, on the contrary, should give to others what he would desire for himself from others, and that the law each one lays down for others he should use himself. Hence, too, it is that everyone, being dearest to himself, should not only lawfully provide himself with safeguards against injury imminent from others who recede from the path of right, and by opposing beams, walls, and ditches to thieves, robbers and enemies consult his own security; but also that he should defend himself against the violence of others, repel force by force, arms with arms, even taking the life of the aggressors, if he cannot otherwise protect life or chastity which is in danger, and thus preserve the moderation of an unblameable defence. *l. 1. C. unde vi. (C. 8. 4.). l. 1. § vim vi. 27. l. quod est. 3. § eum igitur 9. ff. de vi et vi armata (Dig. 4. 3. 16.). l. 1. § item 4. ff. ad. leg. Corn. de Sicariis. (Dig. 48. 8.). l. scientiam, 45. § qui cum aliter 4. ff. ad. leg. Aquil. (Dig. 6. 2.). l. 3. ff. h. t. Cicero, in his oratione pro Milo, generally.*

16. This law of nature, being established by divine providence, remains ever firm and immutable, § *pen Instit. de jure nat. gent. et civil.* (Inst. 1. 2). "It is," says Lactantius, "*divin. Instit. cap. 8.* a true law, a right reason consonant to nature, diffused among all, constant and everlasting, which calls us to duty by its command, deters from fraud by forbidding it; nor can we be released therefrom either by the senate or the people." For since right reason which includes and enters into natural law, owes its origin immediately to God, and is referable to divine reason itself, as being as it were the image of divine law, and a kind of expression of it, it necessarily follows that that law of nature is itself immutable, for otherwise, if you admit its mutability, we must also admit a variation in God, and a real repentance from his former plan, and thus either a confession of his prior error, or his change for the worse of what had been rightly determined on. How much this would be contrary to the holiness and perfection of God, no one can fail to see. *Grotius de jure bell. et pac. lib. 1. cap. 1. num. 10. in med., Hornius de civitate lib. 2. cap. 2. num. 5., D. Noodt probabilium lib. 2. cap. 11.*

17. Meanwhile you will not deny this, that this law immutable in *thesi* (i.e. in proposition) may yet be mutable in *hypothesi*, (i.e. in supposition), as they say. By which nothing else is meant than that the general precepts of natural law, flowing

from the dictate of right reason, as they do, are subject sometimes to exceptions, which are themselves none the less founded on natural reason, and thus are not really contrary to its universal precepts, nor subvert them, but rather confirm them, according to the proverb "that exceptions confirm the rule in non-excepted cases." Thus, although the law of nature wholly forbids homicide, it allows the death of a robber using violence; and commands the capital punishment of criminals when it is imposed by the Judge. Further, since in many cases the law of nature counsels a thing, but does not command it, nor forbid the contrary, the consequence is that for just urgent causes you may lawfully depart from such suasion. Thus it is agreed that liberty, and communion of things, and many other similar matters, obtained force among the first mortals by natural suasion: afterwards, on account of multiplication of the human race, and hot wars, the introduced distinction of ownership, and the system of slavery following on captivity, men receded from their earlier ideas, and not without just reason. That natural law is immutable which prescribes what is honourable, and forbids what is base; but that which prescribes what is lawful, or permits the intermediate, can, in part, allow of being tempered, moderated, changed, by the civil law.

18. The law of nations is what obtains, and is uniformly observed, among all, or at least more established nations. It is rightly divided into primæval and secondary. Primæval is nothing else than the law of nature of mankind received by nations. For where the dictates of natural reason happen to be observed among many nations, it is not unreasonable that they should assume the name of the "law of nations" from this use of nations; if, however, many established nations reject them, then these dictates subsisted in the bare unpractised limits and denomination of the law of nature, § 1. *Inst. de jure nat. gent. et civil.* (*Inst.* 1. 2), *l. omnes populi*. 9. ff. *h. t.* (*Dig.* 1. 1). Hence we see the examples of this law taken by the juris consults from those things which the law of nature orders, such as reverence towards God, obedience to parents and our country. *l. 1. in fine l. 2. ff. h. t.* (*Dig.* 1. 1). The secondary law of nations is what is not gathered so much from the light of reason as collected rather by legal ratiocination, and accommodated not so much to the goodness of an incorrupt nature as to the necessities of a depraved nature; and it is thus what the nations laid down for themselves as use and human necessities required. § 2. *Inst. de jure nat. gent. et civilis.* (*Inst.* 1. 2.). This must not be understood as if there were a law of nations binding all nations, as nations, or binding all peoples in public commerce existing among nations, so that those transgressed, and were punished, who departed from this law, and in the same way as the natural law binds all men and the civil law all citizens. I do not find that anything of this kind was agreed between nations, or that there was such a common chain among all the nations, as nations. But rather thus, that whatever was ascribed to the secondary law of nations in public and private matters cannot be said to have been laid down by the nations, in another sense than this that, as mankind multiplied, whatever was by ratiocination considered useful and suited for promoting commerce among men, was gradually approved by the use now of this and now of that nation, and so at last of many nations; not binding any nations by a general obligation beyond this. Wherefore what is said to be the law of nations, was at some places received quickly, at others slowly, and at times that was in some

places even rejected, without any violation of justice, which once had pleased the nations as being fair. Thus, for example, since individuals are not supplied with everything, nor does every land produce all it needs, so necessity and utility, together, persuade us that commerce will be more fully cultivated by the medium of contracts: the oldest among which, and the one most approaching simplicity, was exchange (*permutatio*). But as what others from time to time wanted, was not always superfluous with ourselves, purchase followed, coin having been discovered, or counted money, as a standard of the value of other things, l. 1. ff. *de contrah. emtione*. (Dig. 18. 1). As an aid to those who had not money enough to buy things, letting (*locatio*) was introduced, so that for a little money they might have the temporary use of articles useful to them. If they had not enough money to pay the hire, either they had recourse to the liberality of others by getting the gratuitous use of the article, when a loan, by way of a accommodation (*commodatum*) or a loan at pleasure (*precarium*) took their origin; or money was elsewhere obtained for paying the necessary price of purchase or hire, whence the contract known as *mutuum* arose. And as a creditor meanwhile ran the risk of his capital, it was thought fair that other things should be given to him by way of security, until the restitution of what was thus borrowed; this was done by an intervening contract of pledge (*pignus*). As all were not equally quiet or apt in managing and taking care of their own affairs, on account of youth, absence, travelling, modesty of sex, unskilfulness, or sloth, it became the custom to commit the charge of them to another, by way of mandate or deposit. And if any did not seem equal to carrying on business alone, assistants were taken, partnership was entered into, and business was carried on by division of labour. When by these and other similar kinds of contract the want of many things, under which men laboured, was supplied, it was not surprising that any particular nation which desired to be the more cultivated thus the more freely adopted these laws for its use, or admitted laws already invented by other nations, and often times fashioned into special laws. There was no intrinsic obligation, whether resting on honour or dishonour, why any nation should share these contracts with any other nation; nor were those nations looked upon as offending, or breaking the principles of justice, who interdicted commerce with other people, on their own soil and thus disapprove and forbid among their own citizens certain kinds of contracts, which they determine not to allow in their own States. They incur no more reproach for this than we or any other nation where the laws of slavery and manumission are abolished as less suitable, although those laws may have been elsewhere lauded among the nations. Nor is the principle different in regard to public national acts, such as laws of embassy, solemn denunciations of war, and other like matters; since these are not evolved from certain principles, like the law of nature is; it is from the practice and wish of the nations, that they have taken special form and condition. For as to the recognition of ambassadors sent to allied and friendly nations, and the sacred character accorded them, this comes not so much from a certain secondary law of nations, as from promise given, and from the principles of the law of nature which teach that faith once guaranteed, even to a private individual, must be observed. And with regard to hostages sent by an enemy being safe and free from injury by the enemy to whom sent, that principle, I think, has no other origin than this, that more established

nations think that peace is more powerful than war with all its triumphs, if they can enter on that peace on honourable conditions; and, in order thus to secure it, have discovered no other more suitable method than that when some of the enemy have been received as ambassadors, as it were, they should treat as to the restoration of peace and making new treaties. But as the office of ambassadors to an enemy, which may be strong enough to do anything by the rules of war, will not be readily undertaken by anyone if he does not hope for, and you cannot promise him, security and protection in going and returning, it was thought expedient to grant to the ambassadors from our enemy, also, an inviolable safeguard, and thus to make peace by means of heralds of truce in war. The consequence of this is that among enemies the sanctity of ambassadors does not otherwise arise than from a promise to that effect given and reciprocated, and hence its origin, again, must be sought and supported on principles of natural law. Thus, it is no novelty, nor opposed to reason and law, that those nations who think peace unconducive to their interests, and prefer war to a treacherous and a hollow peace, decline to receive the ambassadors sent to them, or proclaim that no ambassadors shall be sent to them, otherwise they will be treated as enemies, as Grotius shows us in his *de jure belli ac pacis lib. 2. cap. 18. num. 3 et 5*. When thus we do not expect benefit from mission of ambassadors, and therefore do not extend our security to them, if we should then capture their ambassadors sent, not to us, but to friends and allies of our enemy, such ambassadors cannot by any right expect security or safety from us, but are bound to submit to the usages of war and to captivity, equally with those who were not honoured with any embassy. *Grotius d. lib. 2. cap. 18. num. 5. in med.*

19. If nations have introduced aught by use contrary to the dictate of right reason, you cannot say correctly that that is the law of nations, but, rather, a very bad corruption of the customs of the human race. Thence our jurisconsults, thinking that reason should concur with use in regard to the law of nations, thought those rules should be ascribed to the law of nature, which, properly speaking, are of the secondary species of the law of nations, since use, and human necessities, being presupposed, they seemed to be dictated by equity, and by rational inferences. Such are, for example, prohibitions of theft, distinctions of ownership, and many others. § 1. *Instit. de obligat. quæ ex delicto* (*Inst. 4. 1*): l. 1. *ff. de acquir. rer. domin. et singulorum* (*Dig. 41. 1*), § 11 and 12 *Inst. de rer. div.* (2. 1).

20. The civil law is that which every people establishes for itself: from the dictates of the law of nature, or the rules of the law of nations, it approves particular portions and adopts them as suitable to itself, and to these it adds other at discretion, after its own use of them. In which sense Gaius says that all nations who are governed by laws and customs partly use their own law, partly the law common to all men. And thus you will well divide the civil law, into civil law by origin and by approval. Civil law by approval is what is established among other nations by natural reason or by just inference, and therefore is received by our own State as equitable and good. Thus the law both of nature and of nations condemns homicide, adultery, thefts, and other misdeeds as strongly as possible, and the civil law also prohibits them, and thus by its authority confirms the provisions of both those former laws. The civil law by origin I define as what is established in a State without any certain or peculiar foundation of

natural law, although it is not wanting in a certain general equity. To this branch belongs wills, and most other solemn acts, the deduction of the Falcidian, the provisions of the *Senatus Consultum Macedonianum* and *Velleianum*, and many other Roman laws, both those now antiquated and those still preserved in use. Some are of such a nature that men, ought or ought not, to obey them according as they contain, or do not, contain within themselves a certain moral honesty or dishonesty. Some are only just on this account, that those who have the power of commanding wish them to be so: so that according to their discretion these rules have to be followed or disregarded, and this command and wish of the ruler specially stand in lieu of reason. Very appositely we may here transfer and apply to the legislator what Aulus Gellius says concerning a father, in his *noct. Att. lib. 2. cap. 7*: "all," he says, which humanly happens is as the learned think, either honorable or base: what are right and honorable in themselves, such as to keep faith, to defend one's country, to love your friends, ought to be done whether the father orders or does not order it: their contraries, whatever is base and unjust, are not to be done even if they are ordered. Those which are middling duties, which are called by the Greeks, sometimes *ἀδιάφορα*, sometimes *μέτρα*, such as to do military service, to cultivate the soil, to take public office, to defend lawsuits, to marry, to go where ordered, to come when summoned; these and the like are neither in themselves honourable nor base, but according as the actions themselves performed by us are worthy of approbation, or are to be reprehended; and because in all these kinds of duties, it is thought the father must be obeyed, such as in taking a wife, or defending suits, inasmuch as neither of these is *per se* honourable nor base, therefore a father is to be revered if he order them." Whatever is in itself indifferent, if we find it included by the legislator in one branch or other, as by ordering that after a law is passed in the republic what is just shall be done, and what is unjust forbidden, we must not hesitate to ascribe to that civil law which we have described as the original civil law.

TITLE II.

CONCERNING THE ORIGIN OF LAW, OF ALL THE MAGISTRATES, AND THE SUCCESSION OF THE JURISCONSULTS.

SUMMARY.

1. Of the first beginning of Roman Law, down to the 12 Tables and their composition. The will of the Roman Kings was law at first : afterwards they laid down laws which were collected by Papirius and called the kingly laws or the Papirian law. The Kings expelled, the law became uncertain, then the Decemviri collected the 12 Tables founded on Greek law and the kingly laws.
2. Then came the actions at law, forms adopted by the jurists for the 12 Tables : the Flavian and Ælian law : then followed a host of different kinds of particular laws ; and then the different Imperial Codes down to Justinian's.
3. Then came Justinian's Institutes, Pandects, Code, and Novels, each latter derogating from each former. When Justinian died and the Latin tongue was for a time disused, came the Greek Collections known as the Basilica. In the 12th century the Justinianean law revived.
4. Then came the Canon law, with its Decretals and Extravagants.
5. Then the feudal customs.
6. The Novels and Constitutions of the Emperors subsequent to Justinian did not properly form part of the Roman law, nor have they present authority of law. Neither the Greek Collections.
7. The author does not propose to discuss all about the Roman Magistrates ordinary and extraordinary, urban and provincial.
8. Nor the succession of the juriprudentes. He rather refers to special works concerning them. He refers also to the rival schoolmen of the legal schools of Proculians and Sabinians.
9. The jurisconsults were distinct, in olden times, from the orators of causes. Witness the reproof of Q. M. Scævola to Servius that he, an orator, did not know the civil law. Nor did the Joti know all branches of law equally : they studied some branches more specially, and openly referred clients to other branches, as medical men also do with the eye, the ear, and so forth.

1. The heading of this title teaches us that it treats of three things chiefly; of which the first is the origin and growth of the law, the second is the origin of magistrates, and the third is the succession of the jurists. It is not intended to expound these singly, but noting the chief heads, I shall refer the reader to the writers on the antiquities and history of the law. As regards the laws, the will of the Kings, as was the case with many other nations and peoples, stood in lieu of the law in the beginning, as *Justin. lib. 1. in pr.* witnesses, whom Demeter in *notis ad Rosin. lib. 9 in pr.* in many points confirms. Pomponius also declares that this was so among the Romans, *lib. 2. § 1. h. t.* (Dig. 1. 2), Tacitus also, *lib. 3. annal. cap. 26*; *Dionysius Halicarnassus lib. 10. c. 1.*, and other writers. But when this no longer seemed advantageous to the newly rising Kingdom, afterwards some laws were made by the Roman Kings themselves and collected by Papirius, being termed "the Kingly laws" (*leges regie*) after their authors, and the Papirian law after their collector *l. 2. § 2. and 36. ff. h. t.* (Dig. 1. 2), the vestiges of which in the Pandects *l. 2. ff. de mortuo inferendo* (Dig. 11. 8), and where they occurred in the writers on Roman affairs, were differently collected by Ant. Augustinus, Contius, Manutius, and many others, and from their writings Rosinus gathered them in his *Antiquities of the Romans lib. 8. cap. 5.* When the Kings were expelled, the people again for some time used an uncertain law. The Decemviri borrowed different laws from the Grecian States and embodied them in 10 tables, to these two others were afterwards added, and from this accidental circumstance they were called the laws of the 12 tables, and Cujacius tells us *lib. 3. obs. 40*, that many chapters were even transferred to them from the "Kingly laws." It is not correct to call these 12 tables, as Tacitus says in his *Annal. 3. cap. 27*, the "sum of just law," for the more recent decrees of the Roman people were not framed with the same sincerity nor the consent of the Senate: as Cicero has also said of all the books of the philosophers *lib. 1. de oratore, cap. 44.*, "though they all murmur," he said, "I shall say what I feel, that that book of the law of 12 tables, really seems to be superior to the libraries of all the philosophers, if one looks to the sources and heads of the laws; superior to them in weight of authority and richness of utility." Various collections and digests or illustrating comments on the 12 tables were given by Ludovicus Charundas, Rævardus, Lipsius, Anton. Augustinus, Ant. Clarus Sylvius, Balduinus, Contius, Jac. Gothofredus, and many others.

2. Then came the "actions at law," fixed and solemn forms accommodated by the Jurisconsults to the principles laid down briefly in the 12 tables. They were called the Flavian or Ælian law, from Gnaeus Flavius, clerk to Appius Claudius, who stole them from Appius and presented them to the people; and from Sextus Ælius, who afterwards added others to them. *l. 2. § 5. 6. 7. h. t.* (Dig. 1. 2); and see *Brissonius ad antiquit. Rom. lib. 4. cap. 20.* Afterwards came a large increase of laws made day by day, plebiscites, senate-consults, and edicts of the Magistrates, both temporary and perpetual; and especially, after the republic changed into a monarchy, came Imperial constitutions, partly collected on private authority by Gregorianus and Hermogenianus, partly on public authority by Theodosius the younger, whence they derived the titles of the Gregorian, Hermogenian, Theodosian and Justinian Codes. Concerning these see *Jacobus Gothofredus in his Manual of Law, cap. 2. § 3.*

3. But Justinian, in his Institutes, Pandects, Revised Code and Novels, gathered up our Roman Jurisprudence: the Pandects being derogated from by the Code, the Code by the Novels, the former Novels by the later ones and in the laws of the Code itself the laws of the former Emperors were derogated from by the laws of later Emperors, inserted in the same Code. *Wissenbach in Comment. ad Cod. in pr. de compositione Codicis*, num. 5. 6. 7. 8. *Paulus Voet ad. § 6. proemii Instit. num. 2. Bockelmannus ad Pandect. in prolegomenis*, num. 4. Justinian dying, and Italy being devastated by barbarous nations, the Latin tongue and the Roman laws lay both neglected, although they were afterwards in a measure revived. Greek books called the Basilica were composed and published under the Emperors Basilus Macedo, Leo, and Constantinus Porphyrogeneta. The Nomocanon of Photius, of Michaelis of Attalis, the Manual of Harmenopolus, the Institutes of Theophilus and many other Greek works were written; these are fully treated of in the sketch of the reliques of the ancient law and of the jurisprudence after Justinian, which you will find as a preface to the Corpus Juris, Amsterdam and Leyden Edition, year 1663, in folio. Also *Jacobus Gothofredus in his Manual of Law*, cap. 6. *Josephus Maria Suarezius de notitia Basilicorum*, in the preface to the Basilican books, issued by *Fabrotius*. In the 12th century, in the time of Lotharius, the law of Justinian was again brought to light and revived in use at Bologna and elsewhere by Irnerius and other interpreters of like fame with him; and in following centuries it also began to be taught by those whose lives you will find narrated by *Foster, Historia juris*, lib. 3. cap. 5. et seqq., usque ad finem.

4. About the same time the Jus Canonicum came to be composed. First in the time of Pope Eugene, Gratian collected that part which is called the Decree. By order of Gregory the 9th, Raymundus compiled the decretal letters of the Popes and published them in 5 books. Boniface the 8th added six, but subdivided in five books. To this the Clementinæ were added by Clement the 5th and John 22nd, and at last came the Extravagantes. A Seventh book of decretals as gathered by *Petrus Matheus*, a Leyden Jurisconsult, and the Canon Law Institutes of *Paulus Lancelottus*, are subsequent editions of the Corpus Canonicum, but issued without any public authority.

5. The feudal customs were also composed and collected by *Obertus de Orto*, and *Gerardus Niger Capagistus*, Mediolanian (Milanese) Consuls, and other uncertain authors, as *Cujacius* says; and he added extraordinary chapters from *Alvarettus* and *Ardizonus* and a fifth book of feuds. Concerning these, and generally concerning the history of law see *Besoldus de libris utriusque juris*, part 2. in pr. in dissertat.

6. As far as regards the novels of *Leo* and *Heraclius*, *Nicephorus*, *Connenas*, *Fredericus*, *Henry the 7th* and the Constitutions of many other subsequent Emperors, added to the Corpus Juris of Justinian, it is certain they neither constitute a part of Roman law, properly so called, nor are of equal authority to it. In the same way, the laws from the Basilican books, although restored in the code by learned men, and by Greek writers, cannot be said to be unsuitable for the purpose of illustration, yet you would in vain cite them as proofs in the court and in the schools, both because they were never received by our rulers, and because they are, admittedly, often epitomes of the

Greek constitutions, as the original constitutions were lost by carelessness and the injuries of time. *Ant. Matthæus, de auction., libr. 2. cap. 6. num. 13: Brunnemannus in cod. in prolegomenis ad tit. de novo Cod. faciendo, in fine.*

7. In the second part of this title we treat of the Roman Magistrates. It is not my intention to expound their origin, duties and power, more especially as the compilers of the Pandects themselves devoted one part of their first book to the Magistrates mostly mentioned and used in the laws. Besides which if any one would wish by a more full enquiry to ascertain, by a digression, what has been said by *Pomponius in l. 2. h. t., (1. 2)* and of the many ordinary and extraordinary magistrates, urban and provincial, what their duties were and what their offices, let him consult *Rosinus* in his whole work 7, on the Roman antiquities, where after having first given a summarized catalogue in his second chapter, he discourses about them at great length.

8. With regard to the succession of the Jurisprudents who flourished in the free Republic and also under the Emperors, in what age they lived, who reigned, what works they wrote, for what honors they were conspicuous, *Pomponius* partly teaches in *l. 2. § 35. et seqq. h. t. (Dig. 1. 2):* likewise *Gotofredus* in his *Manual of Law, cap. 7,* and *Valent. Forsterus* at full length in his *History of the Civil Law, lib. 2. cap. 2. et seqq. down to cap. 82.,* and, more recently, the illustrious *D. Eck,* the most worthy Professor of the *Ultrajective law* in his principles of the civil law *h. t.:* also *D. G. van der Meulen* in his commentary on the history of *Pomponius,* on the origin of law, part 3. Since all cannot hold the same opinion in the decision of legal controversies it came about that, with the lapse of time, sects of Jurisconsults arose, chiefly born from *Ateius Capito* and *Antistius Labeo,* and taking their names from the chief followings of each, for when *Sabinus* succeeded *Capito* and *Cassius* succeeded *Sabinus,* the name of *Sabinians* and *Cassians* was given to the Jurisconsults who adopted their views; when *Proculus,* after *Nerva,* succeeded to *Labeo,* the students of this opposite sect secured the name of *Proculians.* Their frequent differences of opinion *Justinian,* for the most part, removed by his decisions inserted in the revised Code: still beyond doubt there are many vestiges of their differences spread through the responses of the old Jurisconsults.

9. The Jurisconsults were formerly distinct from the pleaders of causes, as is evident from the example of *Servius,* who, although he had obtained the second place to *Marcus Tullius* in defending suits, is said not to have joined to his eloquence any knowledge of the civil law, until stimulated thereto by the sharp reproof of *Mucius,* by way of contumely, "that it was a disgrace to a patrician, a noble, and a pleader of causes to be ignorant of the law in which he was employed." But, anciently, all were not equally skilled in all branches of the law, for some cultivated more happily the one branch of Jurisprudence and others another, and it therefore happened that the Jurisconsults themselves were not ashamed to send their own clients to others, whom they candidly acknowledged to be more skilled than themselves in any particular branch of law. *Quintus Scaevola,* the *Angur* and most illustrious and certain prophet of the law, whenever he was consulted as to the law of estates, was wont to refer his consulters to *Furius* and *Casellius,* as more given to its study. This we know from *Cicero pro*

Balbo and Valerius, *lib. 8. cap. 12. num. 1.*, for since anciently as many responded as were engaged in legal study, it is not astonishing that it happened to Jurisconsults, at that time, as it has happened to medical men, that as some more successfully cure the eyes, other the ears, others other peculiar vices and diseases, while others again exercised all branches of medicine, so some professed and showed a high degree of skill over others in regard to the whole law as a science, while others did so only in respect of particular parts.

TITLE III.

OF THE LAWS, THE SENATE CONSULTS, AND LONG CUSTOM.

SUMMARY.

1. Tacitus shows that the best laws are born from the crimes of some persons. Voet confirms this, citing Justinian.
2. Papinian's definition of law given. Law must be founded on the advice of prudent men, not rashly, nor at the mere will of the legislator, without reasons of justice, equity, public utility. Codicils were not introduced till skilled lawyers had been called together and had recommended them. Valentinian and Theodosius required two unanimous confirmations by the conscript fathers, and a public solemn recitation, and the assent of the Emperor, before a law obtained force.
3. Law is meant for the suppression of crime committed either in free will or ignorance. Therefore there must be free will; not too young, madmen, or idiots. Yet *damnum injuriæ* is punished i.e., where wrong is blamefully done, without intent, e.g., ignorantly summoning parents in law without permission obtained: judges deciding wrongly through unskilfulness: taking the goods of another, in error of fact or law, believing them to be our own.
4. Law is a promise of the whole State, expressed through the people in a democracy, through the legislator in an aristocracy or monarchy.
5. The requisites of law are (1) that it should be just and reasonable, both in subject matter, prescribing the honest and forbidding the dishonest, and in terms establishing equality; (2) that it should be general, and not for particular cases or persons merely, although at times this principle has not been observed. The immodesty of a Carfunia gave rise to the law by which women were prevented from suing, and the usurious extortion of a Macedo to the law that those under age should not borrow. But still though made for particular cases the provisions of these laws applied generally to all women and children; and it is not unreasonable that, to secure the general protection, the good should be subject to such law equally with the bad, for whom they were more meant. Or misdeeds would go unpunished, and loss ensue from youth and luxury.
6. The necessity for reasonableness in a law is not overthrown by the circumstance that a reason cannot be given for everything laid down by our ancestors. This may be owing to lapse of time or neglect of history, not necessarily to actual absence of reason. A strong proof of this cited.

7. Perpetuity is another requisite; that is, the law should never cease in intention, save by a changed condition of men and things, or necessity for a contrary law or disuse. Thus in Roman times, too, the Prætor's temporary annual edicts were written on perishable wood: the perpetual laws on brass.
8. Another requisite is, that the law should be made by those having the authority: in a monarchy the princeps, in an aristocracy the nobles, in a democracy the people.
9. And that there should be promulgation, that it may be known to, and binding on all. The law of Holland first required promulgation for two months before having effect of law: then a month: then from the date of promulgation. Thus the time depends on the will of the legislator. If the time is not specified the law has immediate effect. A prudent judge may still make allowance for a passing stranger, a new arrival, or an offending citizen actually ignorant of the promulgation of the law.
10. Non-promulgated law does not bind, not even those who know its readiness for publication. If its promulgation has been partial, it will bind where promulgated, but not where omitted.
11. A law thus properly passed binds all subjects of all classes and conditions, even the king's household, unless protected by a particular law: also visitors and strangers as long as they remain within our territories. Subjects they bind only as long as they keep domicile; that being changed or transferred, they cease to be subject to former law or jurisdiction.
12. Ambassadors and their retinue not considered to be present; as representing absentees, they themselves are by a fiction of law also regarded as absent. Therefore not bound by the laws of the place where they are, any more than one who really has his domicile elsewhere. If they act wrongly and treat local law with insult, they are ordered to quit the country, and complaints are forwarded to those sending them. Case of Philip of Macedon nobly sparing the Athenian hostage cited, but rebuking the ambassador. Special delegates from the federated provinces of Holland to the States Council are bound by the laws where they are, but as to intestate succession, benefit of inventory, curators bonis, etc., they keep the law of the domicile or place whence sent.
13. Students obey the laws where they study, just as every traveller is bound to do, unless there are particular exceptional laws, *e.g.*, the Leyden University has its own particular privileges as to punishing duels, night-riots, etc. Students have not their domicile where they study, but are exiles for learning's cause, intending to return home when their studies are finished. Therefore, in successions, etc., of movables, they follow the law of the domicile; of immovables, the law of the place where the goods are situated, unless a special law has been made there for students.
14. The law commands, directs, punishes, permits, counsels, rewards, or pardons. Counselling and permissive laws have no real obligatory force on those to whom addressed, *e.g.*, to make a will, appoint testamentary tutors, substitute to those under age or mad, adiate publicly, or abstain from succession. If they are but privileges to one individual, they bind the rest of society.
15. Whether the Princeps is bound is doubtful. By Roman law, at first under the kings, yes. Under the Emperors not, yet the better Emperors obeyed the laws by way of example. They required registration of gifts by, and to them. They admitted the Falcidian or legacies left to them, and the complaint of inofficious testament, and did not accept anything under an informal testament. That

the Romans did not intend their Emperors to be free from the laws is apparent from many references to the laws, which the author then proceeds to make. The Princeps derived position and everything else from the voice of the people. What it gave it might release from; but the people itself could not release him from obligations imposed, not by them, but by right reason, unless it were from the restrictions of the mere civil law, through medium of the senate. The divine and natural laws were binding on his conscience only.

16. What is done or contracted contrary to law is *ipso jure* null, and cannot be upheld, even if the law has not expressly declared it so. It cannot be strengthened by oath. Unless it is an infraction of those laws which merely permit or advise, or unless the law contains a right which can be renounced. What is originally not binding can be ratified by subsequent consent, e.g., marriage of provincial governors with their subjects; contracts of judges; a loan of a *filius familias* without father's consent. Here it is a question of private consideration, but it would be different if public utility were concerned, or if the consent sought to be relied on as given, were that of those protected by sex or age, or other defect, and forbidden to give consent, e.g., the alienation of the dotal estate without consent of the wife, or contracts of minors, prodigals and others to their own disadvantage. In such cases public law cannot be altered by private pact or the laws broken by agreements of individuals. But the act is not *ipso jure* null if the law is satisfied with a penalty imposed on contravention, e.g., the ancient Lex Furia forbidding a legacy beyond 1,000 asses: if made, the legacy remained good, but the taker above that amount was condemned fourfold. Other cases cited where the contract stands, though disapproved by law, and the wronged party entitled to *id quod interest*: e.g., incidental fraud, or alienating to change jurisdiction. Therefore laws are perfect or imperfect. There are instances of laws forbidding, and yet not nullifying what is done, nor fixing a penalty, e.g., the lex Cincia forbidding donations above a certain sum, yet do not declare the higher donation null. A soldier was forbidden to be a procurator, yet his court-acts stood if not repudiated by judge or adversary. A judgment cannot be passed with a condition: yet if so, it is purified as soon as time of appeal passes. An appeal noted suspends a judgment even if it is wrongly noted to the wrong appeal Judge. The reason these and similar acts hold good is that the evils of rescision would be greater than non-rescison. Acts contrary to law are not null and void if law provides for their rescison, as in an inofficious testament, alienations in fraud of creditors, under influence of fear, etc. It is often disputed among commentators whether an act is null and void or capable of rescison by a Judge. Against those null and void, the custom of the Courts is to give restitution, and thus the rescison of the act done, although even without restitution; on the mere allegation of nullity those succeed who are safe *ipso jure*. Only then are those acts *ipso jure* null which are contrary to law, if the law expressly decrees it. Or where the doer has no capacity. Or where it is palpably base.
17. The laws give form to future acts and cannot be drawn back to past acts. For promulgation is necessary, as already explained. What is done before a new law on the basis of the old remains effectual. Thus if a penalty must be affixed to a crime committed before the new law which fixes heavier penalties, you must not follow the penalty of the new law but the former one. Unless the legislator speaks expressly both of the past and the present, which is mostly done in cases of *favorabilia* constituted by a new law. The law is applicable to past transactions, when the Princeps legislating as to doubtful things, introduces a new law. Or when there

was in past transactions a manifest inequity, this inequity may have been intended in former laws. Thus marriage with a deceased wife's sister was declared null and the children born were illegitimate by the old law. And that was weakened by subsequent Constitutions, which had been done against the Church tyrannically. Past alienations of feuds made without consent of lords were rescinded by one Imperial Constitution, after another had already forbidden them. Or it may be that no prohibition appeared in former laws, but a clear injustice was present in such past transactions. Thus *pacta commissoria* were forbidden by the Emperor in the past, present, and future. A law is drawn back to the past when the new law does not so much impose a new provision as interpret a doubtful point in a former law. Or if the sense would be absurd if not retrospective. Or where the new law brings an exception or a remission, this should then also equitably apply to past transactions. Thus where the new law diminished the rate of interest the lesser rate is payable on capital formerly bearing higher legal rates. And on same principle the Ultrajectines thought certain biennial prescriptions should extend also to past debts.

18. An interpretation of the law is often necessary. The legislature alone gives it. Such interpretation has the effect of law. The right to interpret often specially reserved.
19. The interpretation which is sought from the use and custom of a people is not dissimilar to the interpretation of the Princes: whether in a democratic State the people explains its own laws, or in a monarchy the Emperor his constitutions. If there is an ambiguity, first see what law the State used before in similar cases. For an inveterate custom strengthens a doubtful meaning of the law. Custom is the best interpreter of the law: and sometimes even operates as *res judicata*. Fixed interpretations must least be changed. Although judgments even of the highest courts have not the force of law, yet a series of similar decisions may have force of law in interpreting the law.
20. Still the right of interpretation should not be wholly denied to Jurisconsults or Judges, even if not the force of law: whether they extend the operation of the law to similar cases, or its general words to the particular cases indicated: or explain doubtful words and remove the doubtful meaning of the law. Here certain general rules must be observed. 1. Intention of law not settled except on a perfect review of antecedents and subsequents. 2. That interpretation must be had recourse to which is free from fault and suited for carrying out the thing and consonant to legislator's mind. 3. An interpretation not perverting. 4. Not such which circumvents the intention of the law to attain that which the law did not desire, although it has not expressly forbidden it. 5. Not that which would render the law useless and of no effect. 6. Or which would interpret to a man's favour what was meant to his injury. 7. Not an interpretation borrowed from a particular law or necessity and for certain cases only. 8. Or where there is something introduced in error. 9. Nor receding from the strict signification of the words unless where it is manifest the legislator meant it. 10. In doubtful cases follow the words. 11. The intention of the legislator to depart from the ordinary meaning of the words is gathered from antecedents and consequents, preface, epilogue, reason of the law; or fact that ordinary acceptation would involve impossibility, defect, or inept signification.
21. Fictions were common with the Romans. They adapted fictions to real cases by interpretation. Provided the intention of legislator not injured, or reason of law or nature of thing.

22. The "argument from the opposite" fixes the meaning and interpretation of the law so strictly that its result would seem to be law. Unless the resulting meaning were bad, or occasioned a crime, or another law expressly forbid it.
23. If these means fail, and the meaning of the law cannot be gathered or its apparent absurdity avoided, equity does not proceed so far as to allow the judge to despise the law as hard and iniquitous, and to decide against it. For the Judge must decide as to the law, and not as to its justice or injustice. He must decide the effect, not the authority of the law. The legislator must then be asked to interpret or to remove the hardship.
24. These laws of interpretation apply to the statutes of particular nations; and among them the Belgæ. If statutes depart from the Roman law, so must their interpretation. For the Roman law binds no further than by consent, and our own statute law is stronger and more binding than the Roman law, which is only taken in *subsidiûm*. The author *arguendo* shows that we have a right thus to extend the Roman law, as the Roman law extends itself, and also our own modern law and that this is in both cases in accordance with the principles of progressive reason.
25. When interpretation being exhausted left the intention of the legislator clear, the Princeps or legislator was sometimes asked for a dispensation against the clear meaning of the law, to relieve the applicant from the obligation of the law, which still remained of force as regards others. The Princeps has this power, for he could repeal the law in question, and he who can repeal can relax. This proposition the author argues out. But for such dispensation there must be a just and urgent cause, and a public utility.
26. What has been said of the laws can be extended to the Senate-consults, when the Senate replaced the people as legislators. These *Scæ* the author shows were in reality the expression of the Emperor's wish recited in the Senate and afterwards written in his oration.
27. Very similar to law is custom, an unwritten law gradually introduced by us, having the force of law. In a democracy the people freely introduced it at discretion. It had the power of law, and what it did without law was binding. When the Princeps became the law-giver, with his concurrence long habit became custom.
28. Justice and reasonableness its foundations. What is passed in error is no guide in similar cases, but should rather be abolished as an unjust corruption of habits.
29. As custom was only gradually introduced, it was necessary there should be the lapse of a long time; and a frequency of acts freely done, without force or fear. No number of years or acts being defined, it is left to the estimation of a prudent judge. The periods of prescription cannot be applied to custom. Their reason is different, for prescription cannot create a law binding on a whole people, as custom does when it is established. Two acts do not make a custom: there must be a frequency.
30. These acts may be judicial or extrajudicial. That they may be extra judicial, argued out. The advantage of the former is that they can be more easily proved; but if you can prove the latter, they are good also.
31. They must be uniform. If there is no uniformity, and the acts are mixed, varied, and contrary, a lawful custom cannot be founded. Nor does the mere frequency of the act make a custom, when a number of persons who could protect themselves by the written law common to all voluntarily recede from their right, e.g., when having the security of an instrument not solemnly made, we cede it to a more powerful adversary, say the *fisc*, thus vacating a

patrimony not in reality vacant, from fear of lawsuits. Or compromising. Those who do so cannot in this way compel others to imitate their example.

32. Some customs are notorious: others are not. Notorious customs do not require proof. Their mere allegation in Court, as if a written law, suffices. They may in some cases be reduced to writing. He who alleges a custom must prove it as a fact where it is doubtful, whether plaintiff proceeds on it or defendant excepts on it.
33. Custom may be proved by witnesses, documents, &c. The concurrent testimony of celebrated Jurisconsults testifying as to a custom is not to be despised, and is so far received as true that the burden of proof should devolve upon the adversary. Also where a college of Judges testifies to the customs received in their Court. But the opinion of one practitioner, however illustrious, is not sufficient, for he speaks as to the existence of a fact, as to which the most prudent often err. One witness only is not to be heard, whatever his dignity, nor can he be supported by the supplementary oath, which is used to support our own actual knowledge, whereas in the proof of a custom it is the consent of others which is in question, and a frequency of their acts, which must therefore be known to more than one.
34. Most of the ancient authors thought two worthy witnesses sufficient as to a custom. I think those more prudent who require a "crowd" of not less than ten. These it cannot be difficult to get where the consent relied on is that of most of the citizens.
35. A "crowd" of witnesses, even, would not suffice if each speak, separately, of a separate act; or on the reports of others, and not on their own experience, or not able to speak of the non-variance of circumstances in respect of time, persons, or things. Mere negation of a fact by witnesses who say they never saw nor heard of anything in a particular region is not sufficient. They must depose to a contrary fact, and to their never having heard or seen anything opposite to it. For rights are not merely taken away by non-user, or the absence of acts, but by the frequency of other open and opposite acts. The two former may be accidental consequences of compromise or agreement not to sue.
36. The force of custom is that its observance is enforced as a law, of which indeed it is the imitation. It may be extended to similar cases, except where the custom is found erroneous. Custom with us has even subverted the Roman Law, or established laws before the Roman Law was introduced by us. The maxim, that customs are *stricti juris*, and cannot be extended beyond the particular case, is erroneous.
37. A prior law may be abrogated by a subsequent custom, as well as a subsequent law. The author argues this out. That is to say if the custom be reasonable, and not erroneous.
38. A law is technically said to be *antiquated* which was not wholly carried, or rejected: *abrogated*, i.e., utterly repealed: *derogated*, portion of a former law repealed or forbidden: *surrogated*, when something is added to a law: *obrogated*, when anything in the former law is changed: In the last three cases, the rest of the law remains of force.
39. The change or rechange of laws should not be often or rash. Only when the interest of the State requires it. The law of the 12 tables was thus improved by the *Lex Æbutia*. The pretorian law corrected the stricter civil law.
40. He who alleges the abrogation of a once published and received law must prove that as a fact. The duration of laws is presumed until the contrary is shown: even when promulgation being proved, it is

denied that the promulgated law was ever used. In doubtful cases the reception and duration of a law once promulgated is presumed. The presumption of obedience of a law by a subject is stronger than that he should condemn it.

41. It is certain, however, that if a long time has elapsed since promulgation, and there has been no reception or observance, the law is of no force, if the people, contrary to the new law, have followed the old. Non-use alone does not abrogate it, but a frequency of contrary acts not disapproved of by the legislator, vitiates it *ab initio* or *ex post facto*. Thus *fiduci-commissa* are upheld in Holland, and rights declared regarding things thereby affected, although there is no entry in the Public Records, as required by Edict of 1660; for there never has been such a register made.
42. When a provincial law is solemnly carried and promulgated, no State can, by negligence or disuse derogate from it, while the other States are bound. Those who disapprove should seek an abrogation from the provincial legislature, or a particular law for themselves. Thus the Scabinian law of intestate succession was unsatisfactory to some, and they got a new law, more like the Academic. And at Rotterdam, in 1604, the right of representation in the collateral line was extended to the 6th degree from the 4th, in use elsewhere in Holland.
43. As to the maxim that "the law ceases when its reason ceases," this only applies when every reason impelling the legislator to make the law has vanished. If there were many reasons for a law, each in itself is insufficient; but some of the others remaining, the law remains in force.
44. A new law, rejecting a former law or custom, may be extended to similar cases, and not merely restricted, as some say, within its own limits. Argued.

1. "It is proved by practice," says Tacitus in his *Annals*, lib. 15 cap. 20, "that excellent laws, honorable examples, are born to the good from the offences of others. The license of orators produced the Cincian law, the bribery of candidates, the Julian law; the avarice of magistrates, the Calpurnian decrees: for fault comes before punishment: amendment is later than offence." The evil customs and iniquities of the perverters of law give occasion for good laws, which furnish a safeguard to the unfortunate, a solace to the oppressed, a safe refuge to all doing what is just; and, according to the view of Justinian, "neither allow anyone to live in poverty, nor to die in anxiety." *nov. 1. in epologo*, § 1.

2. Taken in a wider sense, Papinianus defined law as "a common precept, the resolution of prudent men, the coercion of delicts contracted either willingly or in ignorance; the engagement of the republic as a whole." *l. 1. ff. h. t.* (Dig. 1. 3. 1.). When it is termed the resolution of prudent men, it is meant to indicate that a law ought not to be passed rashly, nor at the bare and sole will of the legislator, without a full examination of its justice, equity, and public utility; but rather, after consulting those conspicuous for their fame in civil wisdom, and their skill in the matters concerning which the laws are passed. Therefore the law of codicils was, it is known, not admitted before the wise men had been first summoned by Augustus, or before Trebatius and others had counselled and greatly recommended the use of codicils as most useful and necessary for citizens. *pr. Instit. de codicillis* (Inst.

2. 25). That we should not act otherwise in establishing a new law is also decreed by the ever-to-be-remembered words of Theodosius and Valentinian in *l. 8. C. h. t.* (C. 1. 16). "We approve it as reasonable," they say, "that if anything further becomes necessary in a public or private cause, requiring a general form not given by the existing laws, it shall be treated of before all the nobles of our palace, in your most glorious assembly, oh conscript fathers : and if the assent is universal, then such law as you please shall be prescribed : then it shall be again considered anew before the re-assembled body, and if all agree, then only shall it be read aloud in the Sacred Consistory of our divine majesty, so that the consent of all may be confirmed by the authority of our serene office." Justinian laid down decrees not dissimilar concerning the sacred commands, in *nov. 152. cap. 1.* If the opposite course to this is followed, and the legislator's own wish take the place of reason, you may rightly say with Pliny in his panegyric on Trajan, that it is not the part of a good prince, but of a tyrant, to wish to have that for a law which he himself rashly desires.

3. It is further said in the definition above given, that law is "a coercion of delicts which are voluntarily or ignorantly contracted." It very often happens that there is a crime wrongfully done, and yet, from the absence of the will to offend, there is no crime, and that the state of the mind leads to a distinction being made as to misdeeds, so that those are not considered as committing a crime who are not capable of wrong, either on account of innocence of understanding through their youth, or of misfortune, which has made them mad or idiotic. § *placuit tamen 7. et § pen. Instit. de oblig. quas ex delicto.* (I. 4. 1) ; *l. qui injuria, 53. pr. ff. de furtis* (Dig. 47. 2. 53) ; *l. illud relatum 3. § sane sunt 1. ff. de injuriis* (Dig. 47. 10. 3.) ; *l. infans 12 ff. ad leg. Cornel. de Siciuris.* (Dig. 48. 8. 12.). Yet wrong may be done without *dolus*, so that there may be need of its being restrained ; hence damage caused through *injuria* that is *dolus* or *culpa*, even the lightest, is reckoned as a crime ; thus if anyone, without permission obtained, has, through ignorance of the law, or rusticity, summoned in law those to whom reverence was done *l. venia 2. C. de in Jus. vocando.* (C. 2. 2) ; or if a judge has decided wrongly, through unskilfulness of the law : *pr. Instit. de oblig. ex quasi delicto.* (Inst. 4. 1) ; or if anyone through error of law or fact, has taken away from its possessor a certain thing as if it were his own, thinking that the laws allowed it § 1. *Instit. de vi bonor rap.* (Inst. 4. 2). And in this sense, according to Demosthenes, Marcianus laid down that those committing crime either willingly or involuntarily, should be punished ; and so it is laid down that crime is committed not only *dolo* but *impetu*, in *l. 2. ff. h. t.* (Dig. 1. 3. 2). *l. perpesciendum 11. § delinquitur 2. ff. de pœnis.* (Dig. 48. 19. 11).

4. Further, it must be "a promise of the whole republic" and a "common precept," in so far that the people, as a whole, tacitly promises that it will be subject to the law, whether the state is democratic and the people as a whole makes the laws with others : or where civil society is such that there is a supreme legislator and the people then desire to be associated in aristocratic or monarchic rule.

5. There are also different requisites for law, for, in the first place, it ought to be just and reasonable, both in regard to the subject matter, directing what is honorable, forbidding what is base : and as to its form, preserving equality and binding the citizens equally ; for laws should not be made for individual persons, but generally. *l. jura 8. ff.*

h. t. h. (Dig. 1. 3. 8). Thus it was already in olden times decreed by the law of the twelve tables that "privileges should not be imposed," that is, that laws should not be passed for private persons, nor imposed upon private persons, as Cicero witnesses in his "*pro domo sua*" and "*de legibus*." See *Raevardus ad leg. 12. tabular. cap. 2*. It is true though, that when the republic was tottering, laws were passed in respect of individuals, such as, concerning the rule of Pompey, the return of Cicero, and many others. *Gellius Noct. Attic. lib. 10. cap. 20*. *Suetonius, in vita Julii Caesaris, cap. 28*. It is true also that laws are not infrequent, the object of which does not militate against all citizens in the same way, but only against very many, and sometimes only against very few. Still the legislator cannot consider the virtues and vices or hidden faults of individuals, nor who out of a large body of citizens would do what gives rise to the law; therefore both necessity and public utility demanded that, to prevent the crime and faults even of the few, the law should be generally applied to all. Thus, although, for example, we find in many females a praiseworthy modesty of sex, and many minors who are unimbued with evil manners, but are as unlikely as possible to fall into luxury and to prepare snares for their parents, still, from the actions of even but one Carfania taking proceedings and disquieting the judges, and from the bad actions of but one Macedo, a wicked usurer, and the corrupt nature of a few minors, given to luxury, we may learn that the vice of immodesty may also attach itself to other women, and that the like promptings to wickedness arising, may be implanted by depraved nature in all minors and usurers. Therefore it was rightly interdicted that a woman should not sue for another, nor a son under age borrow money, however undoubted their modesty or frugality might be. *l. 1. § 5. ff. de postulando* (Dig. 3. 1. 1. 5). *l. 1. ff. ad senatusc. Maced.* (Dig. 14. 6. 1). So that in these and other laws of the like nature the common maxim does not apply that where the reason of the law ceases, the effect and very disposition of the law itself cease also: for it is not true that it universally ceases in all cases. *Tyraquellus in tract. cessante causa cessat effectus, limitat. 32*. *Fachineus controver. lib. 10. cap. 74*. *Grotius Introd. to Dutch Jurisprudence, lib. 1. cap. 2. num. 28. Et seqq.* *Zoezius ad Pand. h. t. num. 56 et 57*. Should anyone think this universality hard and absurd, that the good should be judged by the same law as the wicked, let him reflect that it would be far more absurd that misdeeds should be unpunished by law, or that some only should lose their goods on account of the backslidings of youth or luxury: which, however, would happen if the law were not equally applied to all. *arg. l. ita vulneratus 51. § aestimatio 2. ff. ad leg. Aquil.* (Dig. 9. 2. 51. 2).

6. This requisite of reasonableness in a law is not overthrown by the fact that we cannot give a reason for all that our ancestors have established. *l. non omnium 20. ff. h. t.* (Dig. 1. 3. 20). For the law should be observed even when its reason is hidden from the most learned, as in the case of the law, *liberum est, 9. ff. de religiosis*. (Dig. 11. 7. 9). For it is very different to say that the first reasons for laying down a law can no longer be traced on account of the lapse of centuries, or the injuries of time, or the neglect of historians, to saying that the law is opposed to right reason. *Christinaeus, vol. 2. decis. 62. num. 13*. *Vinnius Select. quæst. lib. 1. cap. 2. in pr.* And that you certainly cannot deduce the unreasonableness of a law from our being ignorant what its reason really is, is very evident from the clear example which occurred not long ago, given by *D. Cornelius van Eick*

disput. 3. de action et except. hereditar. thes. 8. where he shows that the action *in factum* on account of the prohibited interment of a dead body rests on a just foundation. Gains says of that action *in d. l.* 9. that it is neither given to an heir nor against one, but he has thus more acted from respect, than followed the real reason of that law, *vide tit. de mortuo inferendo et sepulchro aedific.* (11. 8. post).

7. Perpetuity is another requisite; that the law be established with the intention that its obligation shall never cease, unless on account of the changed condition of men or times, or the total cessation of the reason of the law, it is expedient that it should be abrogated by an opposite law or custom. § *pen. Inst. de jure natur. gent. et civili.* (Inst. 1. 2); *l. de quibus 32. § 1. in fine ff. h. t.* (Dig. 1. 3. 32. 1): *Conrad. Rittershusius ad novellas, in proemio cap. 3.* The desire of the Romans to establish this perpetuity is evidenced, I think, by the fact that they used to promulgate the prætor's edicts, that is the annual ones, which were to cease with the expiration of the prætor's year of office, on white wooden tablets, or some other similar material easily destroyed by the injuries of time. *l. si quis id. 7. ff. de jurisdict.* (Dig. 2. 1. 7). Those laws, on the other hand, and other provisions which were to endure perpetually, were inscribed on tablets of brass, and when thus written were placed in the treasury, and then publicly placed so as to become known to all the people. *Suetonius in vita Jul. Cæsaris cap. 28. Tacitus lib. 11. Annal. cap. 14. l. 2. C. de Frumento urbis Constantin. Beroaldus at full length in notis ad. Sueton. d. c. 28.* where he thinks also that. *Pomponius in l. 2. § postea 4. ff. de origine juris* (Dig. 1. 2) should be amended, and for "ivory tablets," be read "brass" (*cæneis* for *eboreis*).

8. It is also necessary that the law should be passed by those who have the power of making law, viz., in a monarchy the king, in an aristocracy the nobles, in a democracy the whole people. Wherefore Justinian, speaking of his own time, says in *l. ult. C. h. t.* (C. 1. 16), that at present it is conceded to the Emperor only to make laws. In the republic that power, it is well known, was in the people, for it is referring to this, that Julian says by way of warning in *l. de quibus 32 § 1. ff. h. t.* (Dig. 1. 3. 32) that the laws do not bind us for any other reason than that they are received by the judgment of the people, and that it makes no difference whether the people declares its wish by suffrage, whereby it then and there acquires the force of law, or whether it induces a custom by words and deeds, which does not agree with what was the case in the imperial times and customs: although it cannot be denied that townships made laws concerning their own affairs affecting their town and its citizens, and that they still do so: as to which more fully hereafter.

9. Promulgation is also required for the validity of a law; for, without it, the people cannot sufficiently become acquainted with the law, nor can the law then bind the people ignorant of it without fault. "The most sacred laws," say the Emperors in *l. q. C. h. t.* (C. 1. 16), which regulate the lives of men ought to be understood by all men, so that as a whole, knowing clearly what is taught by them, they may avoid what is prohibited or follow what is permitted. Therefore Nerva very justly and praiseworthily said, "that if the laws of any community had become hidden, they should be published for that time." *Tacitus annal. lib. 13. cap. 51;* and Justinian, especially in his novels and constitutions directed their publication, in clear words, *novell. 2. 32. 48.* and almost everywhere in their epilogues. As laws do not bind before promulgation, it is also further true that they do not bind citizens immediately

on promulgation, but only two months after promulgation, *nov. 66. cap. 1.* This also found favour with the Courts of Holland in a former century, in its edict (commonly called the Political Ordinance) of the year 1580 art. 35: sometimes it has force after the lapse of a month, *novell 116. cap. 1.* and sometimes even from the very day of promulgation. *l. pen. in fine C. de decurion (C. 10. 3):* so that it appears to depend on the mere will of the legislator from what time the promulgation of the law shall date. Thus it is not unusual that shorter or longer times are fixed by our modern law also, according to the circumstances of the case and diversity of circumstance. If the time be not expressed, it is more correct to think that our laws bind immediately on promulgation. *Gudelinus de jure noviss. lib. 5. cap. 2. vers. sed utrum. Groenewegen 66. cap. 1;* grace, however, not being denied, at the discretion of a prudent judge, to a stranger passing through, or to a new arrival, or to a citizen who, clearly erring through real ignorance of the proclamation of the law, has offended against its provisions. *arg. l. ult. ff. de decretis ab ordine facien. l. (Dig. 50. 19).* *Menochius de præsumtion. lib. 2. præ. 3.* My father *Paulus Voet's treatise on statutes, sec. 8. cap. 1. num. 2. Responsa Jctorum Holl. part. 1. consil. 223.*

10. That an unpromulgated law does not bind, is such an admitted matter amongst almost all, that not even are they considered bound who were aware that it was prepared and would shortly be published: for otherwise it would happen that the law would not bind all equally, and that individual members of society would use different law according as they were aware, or ignorant, that the law had been sanctioned. The consequence of which is, that we must lay down that, when a law or universal edict has been published almost everywhere throughout a whole country, but omitted to be published in one or other place, or town, or village, whether by the neglect of the proper officer, or any other cause, then such law will bind the inhabitants of those places in which it has been proclaimed, but will by no means bind those of such places where it has been neglected. *Ant. Thesaurus. decis. 249. num. 6. Christinaeus vol. 1. decis. 53. et ad leg. Mechlinens. in epilogo num. 31. Ant. Sola ad constit. Sabaudias in præmium gloss. 4. num. 4. et seqq. Jacobus Coren observat. 1. Henric Kinschot responso 40. num. 4. Gudelinus de jure noviss. lib. 5. cap. 2. versu porro. Ant. Matthæus de auction. lib. 2. cap. 7. num. 22. Groenewegen ad. l. ult. ff. de decretis ab ordine fac.*

11. The force and effect of a law passed according to the requisites thus enumerated is to oblige all subjects of every condition to observe it, whether they are plebians or nobles, private persons or renowned in honours, nay even the attendants of the king himself *l. omnes legibus 10. C. h. t. (C. 1. 16),* if they cannot clearly show that they are protected by a particular law. *Maevius ad jus Iubec. quaest. prælimin. 3. num. 33. et seqq. Paulus Voet de statutis sect. 8. cap. 2. num. 4. 5.* Nor does it bind subjects only, but also visitors and strangers, as long as they remain in our territory. *Zoezius ad Pand. h. t. num. 20.* But it binds its own subjects no longer than by having their domicile in that particular place they remain subject: for when they change their domicile, and transfer it to another place, they are neither bound by the laws of their former domicile nor its jurisdiction. *arg. l. ult. ff. de jurisdiction. (Dig. 2. 1): Andr. Gayl. lib. 2. observat. 6. Grotius among the responses of the Dutch Jurisconsults, part 5. consil. 129.*

12. With regard to ambassadors and students, it is doubted whether, during their embassy, or their journeying for the sake of their studies, they are bound by the laws of that country in which they are sojourning for the purpose of their embassy or studies? As regards ambassadors and their train, since they are not to be regarded in respect of their own persons, but represent the absent powers by whom they are sent, it will not be strange if we look upon them, by a fiction of law, as absentees also, and as residing beyond our territories. In consonance with this idea, they are not bound by the civil law of that nation amongst whom they reside for the purposes of their embassy, not more so than anyone else who, in fact, has his domicile beyond such territory. But if they act contrary to duty, and so contumeliously trample upon the laws of the land to which they are sent, that it can no longer be concealed, they may be ordered to leave the country, a complaint being also sent to those whom they represent. *Grotius de jure belli et pacis, lib. 2. cap. 18. num. 4.* In this way, although Philip of Macedon spared one Demochares, together with other Athenians, when, being an ambassador, he acted insolently, still he did not send him away without a complaint. For, as appears from *Seneca lib. 3. de ira, cap. 23*, "Philip, having heard the legates graciously, said, tell me what can I do that is pleasing to the Athenians? Democharis answered, 'Hang yourself.'" The indignation of the bystanders arose at such an inhuman response, but Philip ordered them to be silent and sent Therites safe and unharmed back to Athens: "but you, ye other ambassadors," said he, "tell the Athenians that they are far more arrogant who say these things than those who hear them without punishment." The rule is little different with regard to those who are away from the provinces or town in which they have their domicile, being delegated by one of the states or federated provinces to the more general assemblies of the federated provinces, the States Council, the Council of accounts, or the maritime council and the like. These should, as experience shows, obey the laws of the place where they are residing, in respect to their daily manner of life, but in respect of the rights of intestate succession to their movable goods, when deceased, the benefit of inventory, the appointment of a curator bonis, and the like, they enjoy the rights of their domicile, or of the place which they have left for the cause of the republic: as will be more fully treated in the proper place.

13. Clearly different is the case of those who are students in a foreign land: for in regard to them that great reason of public utility does not apply, nor that sacredness introduced by the law of nations, which was treated of in *tit. 1. ante*: The consequence is that they are viewed according to the common law, and must obey the laws of that place in which they sojourn for the sake of their studies: in the same manner, and as far as, other sojourners are bound while they are in the territory. Unless peculiar provision is made in regard to students in respect to manners, coercion, jurisdiction and the like: in reference to which they do not use the same law as the other inhabitants of the same place, but use a particular law, as we may learn from the example of the members of the University of Leyden, which, besides the privileges of a distinctive court and immunities, enjoys special rights as to punishing duels, night riots, supplications against the sentences of the juridical Academic Senate, and the like: according to the laws made concerning them, and treated of by us in their proper places. For such students, properly speaking, have not their

domicile in the place of their study, but merely are said to travel for the sake of study and to become exiles through the love of knowledge *auth. habitâ C. ne filius pro patre* (C. 4. 13), and really are absent from that place where they have their chief fortune fixed, with the intention of returning thither after their period of study, and thus they have not changed their former domicile. *arg. l. cives quidem 7. C. de incolis* (C. 10. 39). Thus in successions and the like, they follow the law of their true domicile in regard to movables: in regard to immovables, they follow the laws of the place where the thing is situated, as is elsewhere laid down should be followed in regard to the rights of succession of anyone dying when travelling abroad. Unless another law is found to have been laid down for the use of students. *Maevius, ad jus, Lubec. in praelim. quaest. 3. num. 24. et seqq. My lamented father Paulus Voet. de statutis sect. 8. cap. 2. num. 2. 3.*

14.—The law obliges, or commands, or obeys, or punishes, or allows. *l. legis virtus 7. ff. h. t.* (Dig. 1 3. 7.) or counsels. *l. 1. § 3. ff. de peric. et commod. rei. vend.* (Dig. 18. 6). *l. is qui destinavit 24. ff. de rei vindicat.* (Dig. 6. 1). § *sin autem 3. Inst. de pupill. substit.* (Inst. 2. 16) or gives rewards. *l. 1. § 1. ff. de just. et jure.* (Dig. 1. 1) or pardons. *l. cum lex 22. ff. h. t.* (Dig. 1. 3. 22). *l. non omnes 5. § ult. ff. de re militari.* (Dig. 49. 16). Laws which counsel or allow, have, properly speaking, no force of obligation in respect of those to whom they give counsel, or allow: for they leave what they counsel or allow entirely to their discretion and power, without any necessity for doing it; for instance that every one should make a will, appoint testamentary tutors, substitute heirs for children under age for those who are insane, or that one should adiate an inheritance openly, or secretly on account of fear of treachery, or that one should abstain from an unprofitable succession. In regard to other citizens they are not without the binding effect of laws properly so called, in so far that when they allow to one person those things which are not subject to the necessity of the law, they forbid it to all others, lest they should place an impediment to the liberty and freedom allowed by the laws, lest anyone should prohibit another from testating, or force him to testate, or to contract, or to adiate or repudiate an inheritance, or compel one who is unwilling, to do similar things. *tot. tit. ff. si quis aliquem testari prohib. vel coëgerit.* (Dig. 29. 6). *l. invitum 11. C. de contrah. emt.* (C. 4. 38).

15. Whether the Princeps is also bound by the laws is matter of doubtful discussion. If you look to the Roman laws, anciently the Roman Kings were bound by the Kingly laws made by themselves. Tacitus shows this: "especially" says he "was Servius Tullius the author of laws which even the Kings obeyed." *Annal. lib. 3. cap. 26.* But afterwards, the Imperial rule when Tarquin the proud was expelled, was abolished for many centuries. It was restored with the Cæsars, and especially Augustus Cæsar, who under the name of Princeps received under his rule the Republic then wearied with civil discords. He began to exercise Kingly power (for when the Republic was restored to the Emperors it could not be otherwise than that the Romans were under a Kingdom, according to *Dio Cassius lib. 53. pag. mihi 507 in fine*, and then the Imperial Majesty began to be more loosened from the chains of the law. *l. Princeps 31. ff. h. t.* (Dig. 1. 3). This Dio Cassius also witnesses when, treating of the law of the Cæsars, he says "that they have further another right

which was never openly conceded, in all things, to any Roman, for the rulers are free from the laws, by reason of which alone they have the right both of doing what we have said and even of doing everything else." But still the best Princes have not always used the right conceded to them, nor exercised the Augustan privilege (as it is called in *l. unic. § 14. C. de caducis tollend.* (C. 6. 51), but thinking that the people would render an observance of what was right when it saw that the Princeps was willing to obey the laws as well as they, although in fact freed from the operation of the laws, they yet determined to live according to the laws. *§ ult. Instit. quib. mod. test. infirm. d. l. unic.* (Inst. 2. 17). *§ 14. C. de caducis tollendis.* (C. 6. 51). *l. ex imperfecto 3. C. de testamentis.* (C. 6. 23): thinking it a sentiment worthy of the majesty of ruler that he should acknowledge himself bound by the laws and ready to submit his headship to them *l. digna 4. C. h. t.* (C. 1. 16). Thus although they introduced many privileges for themselves and their patrimony, *l. fiscus cum. 6. § 1. ff. de jure faci* (Dig. 49. 14), the Emperors required the registration of gifts bestowed by them on others, or others on them *l. sancimus 34. in fine principii et auth. seq. C. de donation* (C. 8. 54), nor would they allow themselves to be bound by the solemnities of manumissions *l. apud eum 14. § 1. ff. de manumission* (D. 40. 1), and admitted the Falcidian law to apply to legacies left to them *l. in legatis 4. C. ad. leg. Falcid.* (C. 6. 50), and the objection of inofficious testament. *l. Papianus 8. si Imperator 2. ff. de inoffic. testam.* (Dig. 5. 2). Nor did they think that anything should be accepted by them under a testament destitute of the solemnities of the civil law *d. § ult. Instit. quib. modis test. infirmantur* (Inst. 2. 17), *d. l. 3. C. de testamentis* (C. 6. 23). But I believe it to be the truer meaning of even the Roman law that the Princeps should not be freed from all laws, and of every kind; for those laws themselves contain a restriction of this liberty to but the solemnities of the law and to the provisions of the mere civil law. For thus the Emperor is said to be freed from the solemnities of the Imperial law *d. l. 3. C. de testamentis* (C. 6. 23). Also that when he manumits he shall not be subject to the process called *vindicta*, by the law of Augustus. *l. apud eum 14. § 1. ff. de manumissione* (Dig. 40. 1). The same thing is shown by that fragment of the Kingly laws, passed in the reign of Vespasian and which (if it be only genuine) is said to be preserved on cut brass: for it is thereby laid down "that in whatever laws or plebiscites it had been written that Aug. Tiberius, or Julius Cæsar Augustus, or Tiberius Claudius Cæsar, or Augustus Germanicus should be thereby bound, from those laws and plebiscites the Emperor Cæsar Vespasianus was freed." That there was a solemn decree passed by the Imperial Senate concerning Vespasian we know from Tacitus, who in *lib. 4. hist. cap. 3.* says that "the Senate, joyful and full of hope, had decreed to Vespasian all that was accustomed to be rendered to the Princes." And although Papinian asserted in more general words "that the Princeps was freed from the laws" *l. Princeps 31. ff. h. t.* (Dig. 1. 3. 31.), it is manifestly to be gathered from the heading of the title, which is "on the *lex Julia* and *Papia*" that it is capable of restriction to the caducary laws, *Julia* and *Papia* and the like. *Cujacius lib. 15. observ. 30. lib. 26. observ. 35.* To this it must be added that whatever the Roman princeps has, that he wholly owes to the Roman people, as it was conferred on him by the Roman people in the Kingly law passed concerning his Empire

l. 1. ff. de constit. Principum (Dig. 1. 4) § *sed et quod* 6 *Instit. de jure nat. gent. et civil.* (Inst. 1. 2). Whence we may draw an argument as to the power of the Princeps from noting what power the people anciently had. *l. Barbarius* 3 *in fine ff. de offic. prætoris* (Dig. 1. 14). For as the people could not loosen the bonds of that law which had not acquired the force of law from the people but from dictates of right reason, although the law had been approved by the people, it followed that from the mere letter of the civil law the Princeps could well be loosed by the people, or the senate representing the people, and that it could act in this regard according to its own discretion. Beyond this, the Princeps is bound in his conscience by the divine laws and the natural laws and thus by those which are received by the nation as emanating from the dictate of right reason, although if he offend against them he is not subject to the ordinary penalties but must rather look to God as the avenger; this I shall not discuss at length, since it has been so excellently done by my lamented father Paulus Voet in his *Jurisprudentia sacra cap. 1. sect. 2.*

16. If anything has been done or contracted against the laws it is *ipso jure* null, and therefore not to be observed, even if no declaration of nullity has been specially added to the law: so null that it cannot be confirmed by an oath. *l. non dubium* 5. *C. de legibus* (C. 1. 14). *l. jurisgentium* 7. § *et generaliter* 16. *ff. de pactis* (Dig. 2. 14). Unless the laws only allow or counsel, for then they leave it to the discretion of those whom they allow or counsel to follow or neglect the advice given by the law. Or unless they contain a favour for a private person only, for everyone can renounce the law introduced for himself only. *l. pen C. de pactis* (C. 2. 3). It is right that whatever is done contrary to law should stand when the consent is there of those in whose favour, and as a provision for whom, the law was introduced: so that what appears to have been from the beginning of no force and inefficacious as done contrary to law may be ratified by the subsequent assent of those whose benefit was intended by it: as happened in the case of the marriage of a ruler with one in his province, or where a son under age borrowed money without the consent of his father being obtained: and other cases which it would be too long to mention. *l. eos qui* 65. § 1. *ff. de ritu nuptiarum* (Dig. 23. 2), *l. etsi contra* 6. *C. de nuptiis* (C. 5. 4). *l. unic.* § 1. *C. de contractib. judicium* (C. 1. 53). *l. ult. C. ad senatusc. Macedon.* (C. 4. 28) There is nothing that forbids in such cases that the public law, i.e. the law, constituted by public authority, not referring to public loss but only to private affairs, should be altered by the pacts of private persons. *l. jurisgentium* 7. § *si paciſcar.* 14. *ff. de pactis*. (Dig. 2. 14). This would be different if the public utility were concerned, *d. l. 7. § 14.*, or where it is the case of those for whose benefit it has been enacted that they shall be forbidden by reason of fragility of sex, or youth, or any other defect, to injure themselves by their consent and act against their own advantage:—as in the case of the alienation of a dotal estate with the consent of the wife, or where minors, prodigals, and the like contract to their own ruin. *pr. Inst. quibus alienare licet. vel non* (Inst. 2. 8). *pr. Inst. de auctoritate tut.* (Inst. 1. 21). *l. 3. C. de in integr. restitut. minor.* (C. 2. 22). *l. is cui bonis* 6. *ff. de verborum obligat.* (Dig. 3. 15). In these cases it is true, as commonly laid down, that the public law cannot be altered by the pacts of private persons, and that the general laws cannot be thwarted by the contracts

of individuals. *l. jus publicum* 38 ff. *de pactis* (Dig. 2. 14). *l. Neratius quærit* 20. ff. *de religiosis* (Dig. 11. 7). *l. quod bonis* 15. § *frater* 1. ff. *ad leg. Falcid.* (Dig. 35. 2). But that which is done contrary to law is not *ipso jure*, null and void, where the law is content with a penalty laid down against those who contravene it, *arg. l. sanctio* 41. ff. *de poenis* (Dig. 48. 19), as was anciently the case in the *lex Furia* which did indeed forbid that a legacy should be left to anyone beyond a thousand *asses*, but if it were done the legacy remained valid, he who took more being, however, condemned in a four-fold penalty. *Ulpian. in fragm. tit. 1. § 2.*, and even now where fraud attaches incidentally in a *bonâ fide* contract, in an alienation made for the purpose of changing a court, and in many other cases, he who has acted contrary to law so far is bound to compensate *id quod interest* the transaction remaining of effect. Wherefore Ulpian has called those laws which do not destroy what is done, imperfect laws and less than perfect, in his *fragm. tit. 1. in pr.* But as there are laws forbidding that certain things shall be done, and yet not nullifying what is done contrary thereto, nor fixing a penalty, that maxim came into vogue, "that many things are prohibited in law which yet hold good. Thus the *lex Cincia*, formerly, prohibited donations to be made above a certain amount, but did not prohibit the donation, or decree a penalty if more were donated. *Ulpianus d. loco.* And when a soldier was forbidden to act as an agent, what he did in Court as such was ratified, if not repudiated by his adversary or by the judge. *l. filiusfamilias* 8. § *veterani* 2. ff. *de procurator.* (Dig. 3. 2), added to *l. militem* 7. C. *ord.* (C. 2. 13). And although a judgment ought not to be passed under a condition, yet if this be done the judgment stands as if unconditional, as soon as the time of appeal passes, *lib. 1. § biduum*. 5. ff. *quando appelland. sit.* (Dig. 49. 4). An appeal is held good, so that the judgment is suspended, where the appeal is made to a higher Court, other than that to which it should have been made; although such appeal have not been rightly made, *l. 1. § si quis* 3. ff. *de appellation.* (Dig. 49. 1). The reason of all this I take to be this, that in these and the like cases greater inconveniences and greater impropriety would result from the rescission of what was done, than would follow the act itself which has been done against the law, *Grotius de jure belli ac pacis lib. 2. cap. 5. num. 16.* But what is done against the laws is more especially not null if the law has required its express rescission, as in an inofficious will, alienations in fraud of creditors, things done in fear, and very many other cases. Hence, inasmuch as it has been a subject of controversy among the interpreters of the law, whether a particular thing was *ipso jure* null, or was to be rescinded by a judge, it has now-a-days obtained almost everywhere in practice in the tribunals, that in regard to those things which were really null, it was therefore of greater security that restitution shall be obtained, and by means thereof that what had been done and contracted should be rescinded; although even without such restitution those who were *ipso jure* safe, would very often get the victory on an allegation of the nullity of the transaction; as Groenewegen shows in various instanced cases and decisions, *ad tit. cod. in quib. caus. restit. in integr. necesse non est.*; and it is on the basis of this common practice I think, that we read in *Grotius introd. to Dutch Jurisprudence bk. 1. cap. 2. num. 7.* that then only is what is done against the laws of no effect if the law has expressly conditioned it; or denied a capacity or ability to act to him who has acted or done some-

thing; or, lastly, if that which has been done labors under a manifest and permanent baseness.

17. Again, laws, it is certain, give shape to future matters, and are not revocable to past occurrences *l. leges. 7. C. h. t. (C. 1. 16)*; *l. ab. Anastasio 23. §. ult. C. mandati (C. 4. 35)*, *l. contractus 17. C. de fide instrument (C. 4. 21)*. They are rules of action, precepts binding the lives of men, which are to be proclaimed before they bind, as above stated. So that those things remain firm which were done as prescribed by the old law, and before the new law; and if a punishment has to be imposed for a crime committed before a new law laid down heavier penalties, it must not be levied according to the dictates of the new and afterwards arising law, but according to the dictates of the old law; for where (says the Emperor) antiquity sinned unconscious of the present law, it followed the olden practice of the law *l. jubemus 29. in fine C. de testament. (C. 6. 23)*. *Andr. Gayl lib. 2. observ. 9. num. 3. et seqq. Gudelini de jure noviss. libr. 5. cap. 2. vers. utilis. seu. num. 22. Zoesius ad Pand. h. t. num. 43. Paulus Voet de statutis sect. 8 cap. 1. num. 3. Abrah à Wesel ad novellas constit. Ultraject. art. 22. num. 29. et seqq.* Unless the legislator has expressed himself otherwise, speaking specially both concerning the present time and concerning past transactions *d. l. 7. C. h. t.*, which is most of all the case if privileges are established by new laws: it is not inequitable to extend them to present cases not yet decided, nor settled by compromise, thus as it were widening the privileges bestowed. (For examples see *nov. 19. in præfat. l. sancimus 21. in fin. et l. 22. § 1. C. de sacrosanct. eccles. (C. 1. 2)*. Neither equity would allow, nor would the safety of the people, that matters already long settled by the dictates of the ancient law, should be resuscitated by coming of the new law, nor be overturned by it; since a great occasion for law-suits would thus be born, and confusion and uncertainty of law and rights. If to avoid such disadvantages, and to defend the public good we find that even those things are approved which are not lawfully done *l. Barbarius 3. ff. de offic. prætoris. (l. 14)* much less should those things be changed which were done, compromised, or decided before, either according to the laws themselves, or according to a certain interpretation which the laws always had, *l. ult. in fine. C. de legit. hered. (C. 6. 58)*, *l. minime 23. ff. h. t. (Dig. 1. 3. 23)*; *l. contractus 17. in fine C. de fide instrum. (C. 4. 2)*. *Aug. Barbosa axiomat. juris usufrequent. 136 num. 23.* But the laws extend to prior matters done, whenever the principles by writing or decreeing concerning things clearly doubtful, introduced a new law. Also if there existed a permanent iniquity or baseness manifest in past transactions, whether or not it was already known before the prior laws,—thus it was already laid down according to the old laws, that marriages already contracted with the widows of deceased brothers were unlawful, and the children born thence were illegitimate. *l. pen. et ult. C. de incest. nupt. (C. 5. 5)*, and by the constitutions of Leo and Anthemius what had been done against the sacred church in the time of a tyrant was weakened, *l. decernimus 16. C. de sacros. eccles. (C. 1. 2)*. The past alienations of feuds which had been made without the consent of the lord, by the constitution of Frederick, when Lotharius had already forbidden them, *lib. 2. feud. tit. 55.*, were rescinded. The same rule applies even where, on the contrary, no trace of a prohibition appears in the former laws, if but a marked injustice involved in such former laws should counsel the retrospective action; for which reason the Emperor laid down in

regard to *pacta commissoria* as being very unjust in pledges, and to be reprobated, "that together with past pacts, the present pacts also were disapproved, and future facts were prohibited," *l. ult. C. de pactis pignorum*. (C. 8. 35). Further, reason dictates that the law should be extended to the past whenever it is not so much that anything new is enjoined by a new law as rather that an interpretation of a former doubtful law was given *novell. 19. in prefat. in fine. arguitur l. heredes palam 21. § si quid. 1. in fin. ff. qui testam. fac. poss. (Dig. 28. 1). l. si de interpretatione 37. l. 38. ff. h. t. (Dig. 1. 3). Andr. Gayl lib. 2. observ. 9. num. ult. Gudelinus de jure novissimo lib. 5. cap. 2. versu prædictæ seu num. 24. Zoësius ad Pand. h. t. num. 46. Aug. Barbosa d. axiomaticæ 136. num. 34. Or if an absurd sense would be the result of the law, if it were not referred to the past, for where there is a doubt, that meaning of the law is to be approved which is free of defect, and it is to be presumed that such meaning was the intention of the legislator *arg. l. in ambigud 19. ff. h. t. (Dig. 1. 3). Or if an exception to or a remission were introduced by the new law; for then it is fair that it should have effect in past transactions also, whose binding force has lasted up to this time; so that the binding force should not be loosened as to the past, by this exception thus recently introduced, but as to the future. So where by a new law the rate of interest is reduced which minors are to pay in future years, it has effect also in respect of the capital for which heavier rates of interest were agreed under the terms of the former law l. de usuris 27 C. de usunis (C. 7. 54). On this basis the Ultrajactini also laid down that the two years prescription in demanding salaries or the price of things distrained piece by piece, and the like, should exert its force even as to past debts, so that contracts made at any anterior time should be annulled by a prescription of two years computed from the date of the passing of the law, *novella decis. Ultrajectina 14. Aprilis 1659. art. 21. Paulus Voet de statutis sect. 8. cap. 1. num. 3. except. 6. pag. 292.***

18. An interpretation of the law is not infrequently necessary; this the legislator only makes the interpretation in so far having the force of law. Hence it is written that as it is becoming in the Emperor, only, to make laws, so also was it to interpret them, *l. ult. in med. C. h. t. (C. 1. 16). Christinæus vol. 2. decis. 62. num. 15. Gudelinus de jure novissi lib. 5. cap. 2. versa sicut solius. sec. num. 12. Vinnius Select. quest. lib. 1. cap. 2. Paulus Voet de statutis sect. 7. cap. 1. num. 2. 3. In this way Justinian interpreted by l. pen. C. qui. test. fac. posse. what had been more obscurely laid down in l. ult. § 5. in med. C. de bonis quæ liberis (C. 6. 61), and we also see that very many laws nowadays are fortified by a clause by which legislator reserves to himself the right of interpretation.*

19. Not dissimilar to the interpretation made by the Princeps is that which is sought from the use and custom of the people: whether, in a democratic State, the people makes its own law, or in a monarchy the Princeps, himself helping, interprets his own constitution by his own words and deeds. If there arises any question as to the ambiguity of the law, we must first inquire what law the State has formerly used in like cases: for inveterate use fixes the doubtful meaning of a law, and custom is the best interpreter of the law. *l. si de interpretatione 37 ff. h. t. (Dig. 1. 3). l. cum novo 11. C. h. t. (C. 1. 16), so that in ambiguities which arise in the laws, the constant custom or authority of decisions in similar cases obtains the force of law, as Severus wrote*

l. nam Imperator 38 ff. h. t. (Dig. 1. 3. 38); and what once has a fixed interpretation is least to be changed. *l. minime* 23. ff. h. t. (Dig. 1. 3. 23). Even the judgments of the judges, even the highest, have not the force of law, for not by examples but by the laws must judgment follow. *l. sed licet* 12. ff. de offic. præsidis (Dig. 1. 18), *l. nemo iudex* 13 C. de sentent. et interlocut. (C. 7. 45). A series, however, of constantly given decisions in similar cases has the force of law. *d. l. 38. ff. h. t.* (Dig. 1. 3.): *Groenewegen ad. l. ult. C. h. t.*

20. But not on this account is a liberty of interpreting to be wholly denied to Jurisconsults or judges: although it may want the force of law. Either they extend the provisions of the law to similar cases, taking its reason into consideration, where it has force in other matters tending to the like utility: even if the law contain restraining words, which restraint and restriction only applies to excluding different cases, and not those in which the same or a greater reason is found. "What has force in a like case, there that which is like has force; so that if the right of a use of an estate is for two years, so also is it of the buildings. But in the law "buildings" is not named, but of all other things of which the use is annual. Equity prevails, which in similar cases requires similar laws:" says *Cicero in topicis num.* 12. Nor can all provisions be included singly in laws or constitutions. *l. non omnes* 12. l. 13. ff. h. t. (Dig. 1. 3). Or else, on the contrary, the interpreters restrict laws, which are couched in more general terms, to those cases in which only a manifest and adequate reason of law has place: which cases I have noted, *tit. 1. Zoenius ad Pand. h. t. num.* 66. *Vinnius d. lib. 1. select. quæst. cap. 2. post. med.* Or they explain the obscure words of the law, and remove its doubtful sense. That this may be rightly done, certain general principles are to be observed: first of all, you must not decide concerning the intention of the law, unless you have examined the whole law: for from what precedes and follows, often the meaning of the law becomes clear. *l. incivile* 24. ff. h. t. (Dig. 1. 3). Then that interpretation is to be had recourse to which is free from defect, and more suited to carrying out the thing intended, and more in accordance with the mind of the legislator *l. in ambiguis* 19. ff. h. t. (Dig. 1. 3.): *l. quotiens idem* 67. *l. in ambiguis orationibus* 96 ff. de regulis juris. (Dig. 50. 17.): not a perverting interpretation, *l. pen. ff. ad exhibendum* (Dig. 10. 4.), nor such an one as circumvents the intention of the legislator, so that that may happen which the law did not wish should happen, and yet which it has not expressly forbidden. *l. contra legem* 29. l. 30. ff. h. t. (Dig. 1. 3.), *non dubium*, 5. C. h. t. (C. 1. 16.): nor an interpretation which would render the law useless, applicable to no cases, and therefore destitute of all effect. *arg. l. 1. § ult. ff. ad municipalem.* (Dig. 50. 1). *Frav. Sarmientus select. interpret. lib. 1. cap. 12. num.* 8: nor an interpretation which would distort a law introduced in anyone's favour into his severe cost and loss. *l. quod favore* 6. C. h. t. l. (C. 1. 16.) *nulla juris* 25 ff. h. t. (Dig. 1. 3). Nor should an interpretation be sought from what has been laid down for certain cases only, under a particular law, or a certain necessity, *l. quod vero contra* 14. ff. h. t. (Dig. 1. 3.), *l. quæ propter* 162. ff. de reg. jur. (Dig. 50. 17.), or from what was introduced in error *l. quod non ratione* 39 ff. h. t. (Dig. 1. 3. 39). Nor must you recede from the proper signification of the words, unless it is evident that the legislator meant it. *arg. l. non aliter* 69. ff. de legatis 3. (Dig. 32. 1.); and in doubtful case you "must rather follow the words of the edict," as *Ulpianus* says *l. 1. § licet autem* 20

ff. de exercit. act. (Dig. 14. 1.). That the legislator wished to depart from the proper signification of the words can be gathered from the antecedent or subsequent words of the law, from its preface, its conclusion, and the like; also from the reason of the law underlying the law itself: also from the fact that the words, if accepted in their proper signification, would involve an absurdity, an impossibility, a defect, or a meaning not sufficiently suitable for carrying out the thing intended these points are too well known to need any greater confirmation.

21. Since fictions of law were frequent with the Romans, and are even now not altogether foreign to the customs of many nations, it is not unreasonable that those rules which are found laid down in the laws with regard to actual cases may be extended by interpretation also to feigned cases: provided only that neither the intention of the legislator, nor the reason underlying the law, nor the nature of the thing itself should be thwarted, the fiction thus having the same effect in the feigned case as truth in the true case. *arg. § si minorem 4. et seqq. Instit. de adoption* (Inst. 1. 11). *§ namque 4. et § 5. Instit. de action.* (Inst. 4. 6.), *l. sed si plures 10. § in adrogato 6. ff. de vulg. et pupill. substit.* (Dig. 28. 6.) *l. si filius 12. § 1. l. si ante 15. § 1. ff. de interrogat in jure fac.* (Dig. 11. 1.), *Christineus ad leges Mechlin. in prælud. num. 37. Chasseneus ad consuet Burgund rubr. 4. § 1. in verbis, "contracts entre les vifs."* num. 9. 10. 11. *Rebuffus ad constit. regias tract. de chirographi recognitiones num. 98. My lam. father Paulus Voet de statutis sect. 7. cap. 2. num. 16. 17. 18.*

22. Nor must it be overlooked that the meaning of a law can be evolved, and its interpretation gathered from arguments taken from a contrary meaning: so that you may rightly say that that appears to be the disposition of the law which is gathered from its contrary meaning, as being the strongest deduction. This is the view of the Jurisconsults in many places. *l. 1. ff. de offic. ejus cui mandata jurisdict.* (Dig. 1. 21.), *l. ex eo 18. ff. de testibus.* (Dig. 22. 5.), *l. qui testamento 20 § mulier 6. ff. qui testam. facere poss.* (Dig. 28. 1.), *l. cum lex 22. ff. h. t.* (Dig. 1. 3.), *l. inter socerum 26. § cum. inter 2. ff. de pactis dotal.* (Dig. 23. 4.). *Cicero in topicis num. 15*; unless a wrong meaning of the law would result, or anyone would be encouraged to a crime, *arg. l. cum patrem. familias 2. C. de condit. insertis* (C. 6. 46.), *l. reprehendenda 5. C. de instit. et substit.* (C. 6. 25.), or unless another law specially forbade such a construction in this or that nominate case, as e.g. is forbidden in *l. pen. C. qui testum. fac.* (C. 6. 22.) should be given to the words *l. ult. § 5. in med. Cod. de bonis quæ liberis.* (Dig. 6. 61) *Fachineus controvers. lib. 13. cap. 3. 8. 10. Mantica de conjecturis. ult. volunt lib. 3. tit. 15. 16. 17. Josephus de Sesse decis. regni. Arragon 146 num. 13. Brunneanus ad l. 2. C. de condit. insertis August Barbosa loco communi argument. 27. a contrario.*

23. If, when these and the like rules for the interpretation of the law have been applied, and yet the meaning of the law cannot be made clear, nor the inequity and absurdity which the disposition of the law seems to involve, avoided, the force of equity cannot then however proceed so far that, under its cover, a judge should arrogate to himself the liberty of spurning the law as a hard and unjust one, or should adjudge contrary to a clear decision of the law. For it is the duty of a judge to adjudicate according to the law, and not to regard its justice or injustice: the question of fact, and not the authority of the law, is within his power. *l. 1. § quorum 4. ff. ad. Senatusc. Turpillianum.* (Dig. 48. 16.), *joined to l. proposit 12. §, ipsa igitur 1. ff. qui et a*

quib. liberi non fiunt (Dig. 40. 9). *Ordinance of Criminal Justice of King Philip*, 1570, art. 56, *adde tit. 1. num. 6*. There is then rather nothing over but to fly to the legislator himself as the best interpreter of his own words, and the most aware of the intention with which he decreed the law; and to seek from him either an alteration of its hardship, or a more evident and certain interpretation of the law. *l. 2. § sed quia 18. C. de veteri jure enuncl. (C. 1. 17.) l. 1. l. 9. l. pen. et ult. C. h. t. (C. 1. 16.) and ideo 11. ff. h. t. (Dig. 1. 3). Gude-
linus de jure noviss. lib. 5 cap. 2. vers. sicut solius, seu num. 12. Vinnius
select. quæst. d. libr. 1. cap. 2. fere in pr. Wissenbach ad Pandec. disp.
2. thes. 12. et seqq. Paulus Voet de statutis d. sect. 7. cap. 2. num. 2.*

24. What we have thus far said as to the interpretation of the laws must also be applied to the statutes of the Belgæ. For although the doubtful words of a statute ought rather to be interpreted so that they do not derogate from the common law, yet if it is clear the legislator wished you to recede from the civil law, there is no reason why we should have an interpretation of the statutes other than we have of the Roman law; so that statutes receding from the civil law should above all things not receive their meaning and explanation from the civil law but rather from such statutory law itself. *Christin. ad leg. Mechlin. in epologo num. 8*. For if you reflect that the Quiritian (Roman) law binds us for no other reason than because it was received with the consent of the people, or of our leading men, as Julianus said in similar terms. *l. 32. § 1. ff. h. t. (Dig. 1. 3. 32)*, we cannot put our statutory law on any other footing than as it were our own civil law, and the civil law of the whole State, just as the Athenians, the Lacedæmonians, the Romans, and others once also separately used the laws of their own State. Thus our municipal and provincial law has the first place in the decision of cases, and is more powerful than the Roman law, to which we only have subsidiary recourse as laid down in *tit. 1. n. 2. (ante). Hugo Grotius, among the responses of the Dutch. Juris-
consults. part. 3. vol. 2. cons. 197. num. 4. Lambert. Goris. adversar. tract.
4. § 1. num. 2. Molinæus ad consult. Parisiens. tit. 1. ad rubricam num.
108. Chassanæus ad. consuet. Burgund. rubric 4. § 23. in verbis et
qui ne sont payez num. 6. Maeuius ad jus Lubecense part. 2. tit. 2. art.
28 num. 86. 87. D. Joh. a Someren de jure novercar cap. 1. num. in med.
Abr. à Wesel ad novellas constit. Ultrajectini art. 10. num. 10. et seqq.* This being so, on what rational principle should we act if we narrow and restrain the force of our own laws, and their extension to similar cases, or should think less of their justice or equity and force than the Romans thought of those qualities in their laws? It is an inept judgment therefore and too rashly formed which we often find laid down by the interpreters, that there should be a very strict interpretation of the statutes, and that they should not be extended beyond the case of which they speak, whenever they depart from the Roman law. Those interpreters certainly act more prudently, and more as it were in accordance with the honor and majesty of our own country's law, and therefore more rightly, who think that the words of statutes should be extended to all persons and things in which the like reason appears, on the grounds already given, even if such words are not general nor refer to all persons and cases; still they should be thus generally applied as above stated, on the ground of a generally underlying reason, or at all events a reason certainly, and without doubt, understood. And they are likewise right who, on the contrary, do not

counsel restriction unless the circumstances and cases are the same as counselled a narrow restriction of the Roman laws themselves. *Hugo Grotius, among the responses of the Dutch Jurisconsults, part 3. vol. 2. d. consilium 197. num. 17. 18. et consil. 214. num. 12. 13. 14. 15. 16. 17. 18. Molinæus ad Paris. consult. d. tit. 1. ad rubr. num. 108. Modest. Pistoris et ad eum Schultes part 3. quæst 124. num. 106. et seqq. Groenewegen ad procem. Instit. num. 9. 10. 11. 17. Rodenburgh de jure conjugum. tit. 2. cap. 4. num. 8. My lam. father Paulus Voet de statutis sect. 7. cap. 1. num. 5. 6. 7. 8., et cap. 2. num. 3. 4. 5. 7. 12. 16. 17. 18.*

25. Dispensation, as it is called, differs from the interpretation of the law: for interpretation may be made, not by the Princeps alone, but also by Jurisconsults and judges, and is only employed as to a doubtful law, that the probable mind of the legislator may be discovered, and under what disposition of the law certain sorts of acts are comprehended, as has been already said. Dispensation, on the contrary, is only given by the Princeps, or by the author of the law, against the clear meaning of the law: so that by this dispensation the bond of the law is broken, and its obligation on certain persons or things or acts removed, the law however remaining intact in other cases. There is no doubt the Princeps has this power, for he can even abolish the law altogether when a probable cause urges him to do so; and where a law depends originally on the will of a human legislator, much more can he relax the force of that law in a certain case. It is in this respect, I think, that it was said "that it was equal to sacrilege to dispute and doubt as to the worthiness of one whom the Emperor had selected." *l. disputare 3. C. de crimine sacrilegii (C. 9. 29), l. sacrilegii instar 5. C. de diversis rescriptis et pragmat. sanct. (C. 1. 23).* For it is admitted that in decreeing honors and conferring dignities, selecting magistrates, and many other matters of that kind, the prescript of the law as to age, condition, and the like, must be observed: not however that it can be denied that even where the dictate of the law has been not observed, the Princeps or the people can even then confer an honor on one in whom the requisites of the law are wanting, say a prætorship on Barbarius Phillipus, even a slave, *l. Barbarius 3. ff. de officio prætoris (Dig. 1. 14)* or the office of judge on one less than 20 years of age, *l. quidem consulebat. 57. ff. de re judicata (Dig. 42. 1)* or consulship, *l. unica § 2. ff. de officio consulis (Dig. 1. 10)* if the impediment were but known to him who confers the honor, for if he were ignorant of, or erred concerning it, he cannot be said to have shown a wish to give dispensation, though it is not necessary that he express this knowledge in conferring the dignity, as Zozæus among many others rightly says *ad Pand. tit. de senatoribus n. 9.* Anyone therefore detracting from the power of the most sacred Princeps to give dispensation, is not inaptly said to have as it were committed sacrilege. So, also, those decrees are rightly termed "ambitious" by which magistrates, who are under the Princeps in rank, try to give dispensation *l. denique 3. pr. ff. de minor. 25. annis (Dig. 4. 4.)* For as a dispensation is an abrogation of the law, and it is natural that every bond should be dissolved as it was made, so the highest power of majesty is necessary thereto. Hence it has been sometimes interdicted in this country that anyone should arrogate to himself the power of dispensation, the Counts of Holland claiming it for themselves alone, so that even to the delegates of the Counts of Holland (*Gecommitteerde Raden*) and to the assessors of the maritime præfects (*Raden ter Admiraliteit*), the right to give dispensation from the

Constitutions of the General Assembly of Counts as well as of Holland, is found to be rigidly forbidden. *Placitum Ordin. general.* 29 April, et 16 May, 1671, vol. 3 *placit. Holl. pag.* 1242 et seqq. *Placitum Ord. Hollandiæ* 24 Dec. 1674, d. vol. 3. *pag.* 1274, et *placitum* 10 Dec. 1671, which is inserted in the Instructions of the Hon. Delegates of the Courts, art. 51. d. vol. 3. p. 97. But not even those clothed with majesty can rightly remit anything from the divine moral law, or the natural law, or loosen its obligations by any dispensation; for as the authority of that law has not proceeded from them, so neither is it in their discretion and power to alter it. Nor can any reason ever appear to be so serious as to be sufficient to shake and overturn the dictate of right reason, and of commands which are divine, or to impel the Princes to do it. *Besoldus delib. juris ad Pand. lib. 1 quaest. 13. § de dispensatione pag.* 49. Moreover the rules of justice, which is our guide, do not counsel that a dispensation should be granted unless from a just and urging cause, and a certain public utility; for every rashly made relaxation of a good and just law can have no other effect than injury to the State: indeed the public utility which flows from a useful law will perforce be diminished in consequence of relaxation, unless it is otherwise compensated by another equal or greater utility which gives cause to the dispensation. *Grotius de jure belli et pacis lib. 2. cap. 20. num. 24. Zoësius ad Pand. h. t. num. 60. Besoldus delib. juris ad Pand. lib. 1. quaest. 11. in fine.*

26. What has been said of laws you may also almost extend to Senate-consults, after it was allowed to the Senate to consult and make laws, instead of the people; the number of citizens having increased too much to allow of their being called together in one body for the purpose of passing laws, or at least that color was put upon it, l. 2. § 9. ff. de orig. juris (Dig. l. 2) § 5. *Instit. de jure natur. gent. et civili* (Inst. l. 2). See the commentators on d. § 5. *Aulus Gellius Noc. Attic. lib. 14. cap. 7; Rosinus, Antiquitates lib. 7. cap. 6. 7. 8.* This, however, cannot be passed over in silence, that even in the most ancient times, in the first beginnings of the city, *Senatus consulta* were known, as is witnessed by *Suetonius in vitâ Vespasiani cap. 8. in fine.* And under the Emperors, by whose craft and ambition, most of all, the power of the people was transferred to the Senate, the quaestors as representatives of the Princes recited their orations in the Senate, that thus the *Senatus consulta* might be made according to the intention of the Princes; and afterwards we find that contained in the orations of the Princes which is otherwise said to have obtained in *Senatus consulta*. It was laid down as a caution in the speech of the Emperor Marcus that no compromise should be entered into concerning future aliments to be left by will, l. cum hi 8. ff. de transactione (Dig. 2. 15). This prohibition is likewise attributed to a *Senatus consultum*, l. eleganter 23. § item 2. ff. de conduct. indebiti (Dig. 12. 16). A legal hypothec was given by a *Senatus consultum* to him who lent money for the repair of buildings, and our law has also the authority of an edict of the Emperor Marcus for this proposition, l. 1. ff. in quibus caus. pig. vel hyp. tacite contrah. (Dig. 20. 2) joined to l. si ventri 24. § Divus 1. ff. de reb. auct. jud. possident (Dig. 42. 5). The alienation of goods belonging to minors was forbidden by the oration of Severus and Antoninus, but also by a *Senatus consultum* l. 1. 3. ff. de reb. eor. qui sub. tut. vel cura sunt. (Dig. 27. 9) joined to l. si ad resolvendam 7. C. de præd. et aliis reb. minor. sine decr. non alien. (Dig. 5. 71). *Brissonius select antiquit. libr. 1. cap. 16:*

Gothofredus in not. ad d. l. 7. C. de præd. et altis reb. minor. Vinnius de transactions cap. 6 num. 2.

27. Custom is in many points very similar to law. It is an unwritten law, gradually introduced by the customs of those using it, and having the force of law. § *sine scripto* 9. *Instit. de jure natur. gent. et civili* (Inst. 1. 2) *l. de quibus* 32. § 1. *l. 33. sed et ea* 35. ff. *h. t.* (Dig. 1. 3. 35): which Gellius also called a "tacit and unwritten consent," *libr. 11. Noct. Att. cap. 18. fere in pr.* In a democratic state the people introduce it at their freest will: for since they have the power of making law, and as law binds for no other reason than because it was received at the will of the people, so what the people approves without any writing, also deservedly binds everyone: since it does not matter whether the people declares its will by vote or by acts and deeds themselves, *d. l. 32. § 1. ff. h. t.* (Dig. 1. 3. 32). But when all the power of passing laws was transferred to the Princeps, it was not otherwise than by his conniving concurrence that the long customs of the people copied the law. So that it was true in a monarchical reign of this kind, as Constantine said in *l. 2. C. quæ sit longa consuetudo* (C. 8. 53), that the authority of ancient custom and use was not slight: but that it was not so far powerful and weighty of itself as to conquer reason or the law. And that this is much more the case with regard to the peculiar customs of this or that family, or college, as regards the law of succession, primogeniture, &c., *Andr. Tyragueus* more fully describes, *de jure primogenituræ quest. 16.*

28. Not less in custom than in law, are justice and reasonableness desired: so that what was not introduced in reason, but first in error, and thus obtained the force of custom, ought not to obtain in other similar cases, nor to be followed in adjudicating, but ought rather to be wholly abolished, as an unjust corrupter of manners, *l. quod non ratione* 39. ff. *h. t.* (Dig. 1. 8), *arg. l. injuriarum actio* 13. § *ult. ff. de injuriis* (Dig. 47. 10). *Andr. Gayl libr. 2. observ. 31. num. 12. et seqq. Rebuffus ad constit. regias tom. 3. de consuetudine in præfat. num. 42. 44. Neostadius Curia sup. decis. 2. circa fin.* A catalogue of these very bad corrupt customs received in different parts of Belgium, and wiped away in one swoop, as it were, by Philip, King of Spain, in a former century, you will find in the *Ordinance of Criminal Justice, of King Philip, 5 July, 1570, art. 61. vol. 3. Dutch Placaat Book, p. 1032.* Hence it will be easily concluded that neither the common opinion of the commentators, nor the glosses, are of any authority if shown to be opposed to reason and to contain a common error.

29. Since, however, custom is gradually introduced, it was necessary not only that there should be a long lapse of time, as is laid down in the heading of the title of the code "what is long custom" and by the titles of "ancient use," "old age," "established custom," "long custom," "custom observed for many years," "established by inveterate use," "custom anciently approved" and "tenaciously observed," and other similar expressions, *l. de quibus* 32. § 1. *l. 33. ff. h. t.* (Dig. 1. 2). *l. ult. C. quæ sit longa consuetudo* (C. 8. 53). But there is also needed a frequency of freely done acts, performed without force or fear. *l. 1. C. quæ sit longa consuet.* (C. 8. 53). *d. l. 32. § 1. l. 35. l. 38. ff. h. t.* (Dig. 1. 3). As the number of years or of acts is nowhere expressed, it seems left to the estimation of a prudent Judge: although on this point you will find the interpreters differing in various ways, as you may see from *Mascardus de probation. conclus. 424. num. 14. et seqq., Menochius de arbitrar. judicium libr. 2.*

casu 81. et 83. *Rebuffus ad constit. regias tom. 3. d. tract. de consuetudine. Andr. Gayl libr. 2. observ.* 31. num. 7. You will certainly act wrongly if you apply to the introduction of a custom the time fixed by law for prescription: for the nature of prescription is very different to the nature of custom: nor is any law introduced by prescription forthwith to bind others, whereas as soon as a custom is born, the whole people begins to be bound. Two acts will by no means suffice, as may be inferred from *d. l. 1. C. quæ sit longa consuetudo* (C. 8. 53), et *l. an in totum 3. C. de ædificiis privatis*. (C. 8. 10). These laws are each part of one constitution, as may be gathered from the superscription and the subscription; and by them that is ordered to be laid down "which is frequently observed in the same kind of controversies." Nothing contrary to this is found in *l. ubi numerus 12. ff. de testibus* (Dig. 22. 5), for although we concede that where the number is not expressed in the laws the plural number is generally contented by the number two: yet it is in vain you bring that to bear upon the present controversy as to custom, where the requisite is not simple plurality of acts, but a frequency of them. *d. l. 3. et d. l. 1. Bronchorst 1. enantioph. 8. Vinnius ad § 9. Inst. de jure naturæ gent. et civili num. 4. Paulus Voet de statutis sect. 3. cap. 1. num. 10. et. seqq. ad num. 20.*

30. Nor does it matter by what acts the people declares its will: that not only judicial acts suffice, but even extra-judicial acts is apparent from *l. nam Imperator 38. ff. h. t.* (Dig. 1. 3), where custom is put forward as something different from judicial acts and from a series of similar res-adjudications, since the Emperor laid down that either custom, or a series of constantly given similar adjudications has the force of law: which would be absurd if custom were not born unless out of judicial acts and decisions. And since the express consent of the people is sufficient to introduce a law, without a court or the authority of a Judge, there is no reason the declaration of a tacit consent should need judicial authority or confirmation: especially as nowhere in those laws which treat of custom do you find the necessity of judicial acts urged. Since judicial acts are more certain and evident, or at least as certain as possible, and furnish readier proof out of the public records, it is not surprising that those who seem to depend upon the custom of a state or province first of all take care, that they should examine carefully whether the custom has been ever weakened by any contrary judgment. *l. cum de consuetudine 34. ff. h. t.* (Dig. 1. 3. 34.); but if such decision do not appear you can recur to extra-judicial customs if they can but be proved. *Andr. Gayl libr. 2. observ. 31. num. 8. Mascardus de probatione consuet. 427. Christihæus vol. 4. decis. 187. num. 7. 8. Radelantius Curix Ultraject. decis. 13. num. 3. 4. Mævius ad jus Labec. præliminari quæst. 7. num. 19. Zoerius ad Pand. h. t. part 2. de consuet. num. 10. 11. Bronckhorst 1. enant 10. Vinnius ad d. § 9. Instit. de jure naturæ gent. et civil. num. 4. Paulus Voet de statutis sect. 3. cap. 1. num. 13.*

31. The frequency of judicial or extra-judicial acts does not however produce custom, unless the acts are all uniform: for if there appears to have been a variation, and if with many uniform acts many diverse and contrary acts have been mixed, so that now this one is found to have been observed, now another, a lawful custom cannot be gathered from different acts of this kind, for the tacit consent of the whole people which is necessary for such a custom cannot be gathered unanimously gathered from them, *arg. l. nam imperator 38. ff. h. t.*

(Dig. 1. 3) *in verbis perpetuo similiter*. *Mysingerus cent. 6. observ. 42. Ant. Faber Cod. libr. 8. tit. 35. defin. 2. Mævius ad jus Lubec. preliminarium quæst. 7. num. 23. Niger Cyriacus controvers. 523. num. 42. Responsa Jurisc. Holland. part 2. cons. 66. 67.* Hence custom does not arise from this frequency of acts when many private persons who could defend their right by the common written law have willingly given up their right: as by trusting to an instrument not solemnly drawn up, or yielding to a more powerful adversary, say the fisc, claiming an inheritance as vacant which in fact was not really vacant; yielding it either from a fear of law proceedings, or of their reproach, or compromising for any other cause, provided there is no further evidence beyond this of the universal approbation of the people and as it were the tacit agreement of the citizens, as is said in *l. 35. ff. h. t.* (Dig. 1. 3. 35). For the many, even, cannot so make it by their acts that others are thereby bound to cede their rights or to trust to documents wanting a legal form. Rather must there be admitted in these and the like cases the rule which lays down that a thing done by some who consent to it cannot injure others ready to contradict it and to defend their own rights. *Mascardus de probat. conclus. 429. num. 7. 8. 9: Lambertus Goris advers. tract. 3. cap. 12. num. ult. in med. Mævius ad jus Lubecense preliminar. d. quæst. 7. num. 16. 17.*

32. Further, some customs are notorious; others such that it is not so clear that they are confirmed by the use of the people. As respects notorious customs, they do not want proof, but like every other kind of written, and therefore certain, law, it is sufficient to allege them in Court: for though it is considered superfluous to prove what is notorious, that is no reason why, as regards even a custom commonly known, it should not be thus alleged, *arg. § sine scripto 9. Instit. de jure natur. gert. et civili.* (Inst. 1. 2) *l. imo magnæ 36. ff. h. t.* (Dig. 1. 3). *Andr. Gayl libr. 2. observ. 31. num. 17. 18. Mascardus de probation. conclus. 423. num. 26. et seqq. et num. 37. 38. et conclus. 428. in pr. Christinæus ad leg. Mechlin. in epilogo num. 14.* Among notorious customs, also, should without doubt be reckoned those which are reduced to writing by public authority, as may happen: for though writing is not necessary to the essence of a law, so, on the contrary, neither does it belong to the essence of a custom that it should not be written. *Zoesius ad Pand. h. t. part 2 de consuetudine num. 20. 22.* If there is a doubt whether a custom has been introduced according to the usages of those availing themselves of it, as this is a question of fact it is necessary that it be proved by him who alleges it, and who trusts to it: whether it be the plaintiff who alleges it for the sake of strengthening his summons, or whether the defendant rests on it to found an exception: for on the party affirming rests the burden of proof as to what it is, since he contends that it is introduced by use, while his adversary denies that it is of force, *arg. l. ab ex parte 5. ff. de probation.* (Dig. 22. 3), *l. 1. C. quæ sit longa consuetudo* (C. 8. 53), *l. an in titum 3. C. de ædific. priv.* (C. 8. 10), *l. si quis reum 4. ff. de custod. et exhib. reor.* (Dig. 48. 3), *l. testium fides 3. § ult. ff. de testibus* (Dig. 22. 5). *Andr. Gayl libr. 1. observ. 36. num. ult. Christinæus vol. 4. decis. 212. num. 47. et seqq.: Mascardus de probatione. d. conclus. 423. num. 20.*

33. In what way custom is proved by witnesses, by instruments, and other modes of proof, is fully discussed by *Mascardus de probat. conclus. 423. et seqq. ad conclus. 432.* And although it seems not to be doubted that the testimony of many illustrious Doctors which agrees as to the force of a custom, is no authority to be despised, and that

the presumption in favour thereof is in so far powerful that at least the burden of proof of the opposite ought to be transferred to the adversary; *Francisc. Niger Cyriacus controvers.* 209. num. 41; and although the same must be said concerning the assertion of a custom made by a college of Judges, witnessing what would have been received in use in its own Court; *Struvius ad Pand. h. t. num.* 21: still neither reason nor law allows that the assertion of one pragmatic, however he excel in the law, should establish a custom as to which he witnesses, and that in that way a custom should be considered as fully proved. For when one deposes as to a custom he comes into the region of facts, as to which the most prudent is often deceived as is observed *l. 2. ff. de juris et fact. ignorant* (Dig. 22. 6): not to mention that the evidence of one witness, only, is not taken as giving full proof, although he be resplendent with the honor of being a member of an illustrious Court. *l. jurisjurandi* 9. § 1. *C. de testibus* (C. 4. 21), *Mascardus de probation. conclus.* 426. *My father Paulus Voet de statutis sect. 3. cap. 1. num.* 20. 21. This I think so far true in considering this question as to proving a custom, that although in many or most civil disputes the deposition of one witness, supported by adminicular circumstances, can then be supplemented by the supplementary oath administered by the Judge, that is not admitted in matters of custom. For as by means of such an oath the plaintiff confirms what is not fully proved by testimony, and as to something peculiarly known to his own conscience, and not merely having reference to the act of another, so here the doubt which arises is not as to an act of the party swearing, but as to the tacit consent of the whole people: the doubt is not as to the frequent acts of the plaintiff or defendant, but as to those of others. And as there is a presupposed frequency of acts necessary for a custom, it cannot be otherwise than known to all what has obtained by custom. Thus it is apparent, unless I am mistaken, that here the subject matter for a supplementary oath fails. *Joach. à Beust. ad l. admonendi* 31. *ff. de jure jur. num.* 397. *Mascardus de probat. conclus.* 423. num. 5. *Berlichius conclus. pract. part 1. conclus.* 54. num. 82.

34. Although the older interpreters allowed a deposition by two witnesses worthy of belief to suffice for the full proof of a custom, it being commonly said that "in the mouths of two witnesses all truth existed," yet, as the point at issue is not concerning the right of only one litigant, but as to the observance of the right of a whole people for the future, and therefore the benefit or injury of all the citizens depends on it, I think they judged more prudently who considered that a "crowd" of witnesses, not fewer than ten, were necessary to the proof of a custom: especially since it does not seem difficult thus to prove it; for he who trusts to a custom necessarily presupposes the tacit consent of the people introducing it and, therefore, the knowledge of most, if not of all the citizens, without which knowledge the consent would be null. Thus anyone truly alleging the introduction of a custom, could find, without difficulty, a very numerous crowd of witnesses. *Ant. Faber Cod. libr. 4. tit. 15. defin.* 14; *Joh. Papon. libr. 9. tit. 1. arr.* 20; *Zoezius ad Pandect. h. t. part 2. de consuetud. num.* 20. *in fine.*

35. But even a crowd of witnesses brought to prove a custom does not suffice, whenever they are single witnesses deposing to different acts; for they cannot otherwise give testimony than if they bear testimony to a frequency of facts, and this not according to the statement

of others, but from their own experience, the reason of their knowledge being added by them ; and provided that they do not vary in regard to the relative circumstances of the act in respect of time, thing, and place. *Andr. Gayl libr. 2. observ. 131. num. 15, 16. Mascardus de probationib. conclus. 424. num. 11 et 22. Mynsingerus cent. 6. observ. 42 num. 1. 2. Christinaeus vol. 4. decis. 212. num. 48. et seqq. Paulus Voet de statutis sect. 3. cap. 1. num. 22.* The simple negation of a fact, made in the deposition of witnesses, is not sufficient for the proof of a custom, since such witnesses only say that they do not know, or have not seen, that this or that custom is observed in the country : whereas what is required is, that they should make declaration of contrary acts, and further, that they never heard or noticed anything done opposite to such acts. For ancient rights are not taken away merely by disuse, or by absence of acts, but only by the frequency of contrary acts openly exercised : for often by compromises, or private agreements interposed, the opportunity is wanting of using rights which may be even the most approved and equitable in the State. *Donellus comment. juris civilis libr. 1. cap. 10. in med. Mævius ad jus Lubec. quæst. prælimin. 7. num. 16. et seqq. Christinaeus ad Leg. Mechliniens. in epilogo num. 13. Andr. Gayl libr. 2. observ. 60. num. 3. Mascardus de probation. conclus. 429. num. 6. Ant. Matthæus de auction libr. 1. cap. 10. num. 34. 35. Responsa Jurisc. Holl. part 1. consil. 185 quæst. 1.*

36. The force of a custom is, that it binds citizens to its observance, equally with a law, which as it were copies § *sine scripto*. 9. *Instit. de jure natur. gent. et civili (Inst. 1. 2), l. 32. § 1. l. 33. 35. 38. ff h. t. (Dig. 1. 3).* The consequence of which is, that it receives a similar interpretation to the law, and an extension to similar cases, based on the similitude of reason : especially as it is written that "the reason also which counselled a custom is to be preserved," *l. 1. C. quæ sit longa consuetudo (C. 8. 53).* And when anything has been laid down as to a merely erroneous custom, it does not obtain in like cases, *l. quod non ratione 39. ff h. t. (Dig. 1. 3).* This is very consonant to our modern usages whenever we see the Roman law overturned by custom : for, as many things were introduced among us by inveterate use, even before the Roman law was known in these regions, and thus constitute our civil law, it could not well be otherwise than that, on the example of laws of all places, the fullest interpretation and extension to similar cases is admitted. On the other hand, those maxims are considered erroneous which say that "customs are of strict law," and "should not be extended beyond the cases of which they speak," and many more of the same kind. *Adde num. 24. h. t. (ante).*

37. Nor is it less a consequence of what has been said, that a former law is not only abrogated by a subsequent law, but also by custom ; for since it makes no difference whether the people declares its wish by things or deeds, it is also very rightly laid down that the laws are not only removed or changed at the will of the legislator, but also by tacit consent of all, by desuetude, § *pen. Instit. de jure naturas. gent. et civili. (Inst. 1. 2), l. de quibus 32. § 1. in fin. ff. h. t. (Dig. 1. 3).* So that not even the clause not infrequently found in the laws, especially the municipal laws, "custom not opposing," prevents this result, since it is accepted as applying to past customs and not to others which may be afterwards introduced. For since no private person can lay down the law to himself, by testament, that he will not be allowed to recede from his last made will, *l. si. quis in principio 22 ff. de legatis 3. (Dig. 30. 3),* so also, since laws do not remain always commendable for

the like utility as that for which they were originally introduced, manners and time changing, it would therefore be clearly incongruous to wish to lay down, by law, that the laws should not be reformed for the better, whether by new laws or customs commended by right reason. *Zoësius ad Pandect. h. t. part. 2. de consuetudine num. 15. 16.* What has been said about custom abrogating a former law, clearly refers to one which is reasonable, and introduced in a democratic State (in which the power of laying down the law is with the people). But if it appear to have obtained, not in reason but in error, it is destitute of the force of law, and therefore not to be observed in other similar cases, *l. quod non ratione 39. ff. h. t. (Dig. 1. 3. 39)*, and thus cannot overcome the law, which is founded on just reason and equity, *l. 2. U quæ sit longa consuetudo (C. 8. 53)*. Not any more certainly, than it could be allowed that in a monarchical rule, the people should take away by contrary use, however inveterate, constitutions sanctioned by the princeps; unless the tacit consent and connivence of the princeps is manifest. For as the people has transferred to the princeps all power of making law, it belongs to him, by natural reason, to loosen, who is able to bind, and to him to be unwilling, who can be willing, *l. 4. ff. de regulis juris (Dig. 50. 17)*, and how, I pray you, can anyone, without the consent of the legislator, break the reins of the law, who is himself deprived of the power of making law, *arg. l. prætor ait 3. § Divus Hadrianus 5. ff. de sepulchro violato (Dig. 47. 12)*. *Donellus comment. juris civil. lib. 1. cap. 10. post med. Christicæus vol. 1. decis. 291. num. 1. 2. 3. Bronchorst 1. enant. 9. in med. Zoësius ad Pand. h. t. part 2. de consuetud. num. 29. et seqq.* Certainly, if you assume that custom is introduced by the people, not against law, but without law, concerning those things which are not defined by the written law, you will scarcely require the special connivance, joined to the knowledge, of the princeps; but it will suffice that he did not contradict the custom, even if he was ignorant of it, or that he did not remove it, especially since it is not probable that all the peculiar usages and manners of the subjects of a State are attentively regarded by the legislator. With regard to those customs which are not opposed to the written law, we may apply what is found in *l. de quibus 32. pr. l. diuturna 33. ff. h. t. (Dig 1. 3)*. *Zoësius h. t. d. part. 2. num. 18 and 23.*

38. In what other ways the obligation either of law or custom is removed, say by a subsequent law or by a custom contrary to a former custom, is sufficiently clear from what has been already said. And lest anyone should have a difficulty as to the technical terms of our law, we must here remind them that we say that a law is *antiquated* which was not carried through all its stages, or not passed, being asked for and rejected. That a law is *abrogated* which after having been once carried was wholly removed. That a law is *derogated* from, when either the first part thereof is removed, or when, by a new law, that is sanctioned which was forbidden by the old law. That a law is *surrogated*, when anything is added to the former law; that it is *obrogated* when anything in the former law is changed. And as when a law is *derogated*, *surrogated* or *obrogated*, it does not wholly lose its force, it was rightly written by Paulus that it is nothing new that the former laws should be drawn on to the subsequent ones, *l. non. est. novum 26. ff. h. t. (Dig. 1. 3)*. *Raevardus ad legem. 12. tabularum cap. 1.*

39. Although it has been well observed by those skilled in civil wisdom, that the laws should not be too easily, or too rashly, fashioned

or re-fashioned, yet changes should be approved when the evident utility of the State accompanies the innovation thus made, and greater benefit is hoped from the new than disadvantage feared from the old law: "You are certainly not unaware," says *Aulus Gellius in his Noct. Attic. libr. 20. cap. 1.* that the provisions and remedies of the laws should be changed and re-woven with the manners of the times, according to the nature of the State, and to reasons of present utility, and according to the measure of the faults which are to be remedied, and should not remain stationary in one condition, but, like the face of the heavens and the sea, they should be varied with the tempests of circumstances and fortune." And thus the laws of the 12 tables were corrected and amended in many points by the *lex Æbutia* as the same Gellius tells us, *libr. 16. cap. 10.* The very prætorian law itself was introduced not merely "to assist and supplement," but also to "correct the civil law, for the public utility," as Papinianus wrote, *l. jus autem 7. § 1. ff. de justit. et jure (Dig. 1. 1. 7).* If such marked utility however do not appear, we ought not, as already said, to recede from that law which has long seemed right. *l. 2. ff. de constit. Principum (Dig. 1. 4).* *Rittershusius ad novellas in proœmio cap. 3.* And see my oration "On joining the knowledge of the Roman and modern law."

40. Whoever alleges the abrogation of a law once published and received, is required to prove it, as it is a matter of fact. For since the laws are established with the intention that they should endure perpetually and be so observed by the people, the consequence is that the presumption should be in favor of their continuing obligation and enduring use, until the contrary be proved. *Menochius de presumption lib. 2. præsumpt. 2. num. 4. Gratianus discept. forens. cap. 559. num. 55. et seqq. Maevius ad. jus Lubecense quæst. preliminar. 9. num. 71.* This I think to be even true when it is agreed there was a promulgation, but it is denied that the people ever received the promulgated law in use. For although this is a question of fact, "what has been received in use?" and thence the proof of the reception is desired from him who alleges it; *Menochius d. libr. 2. præsumpt. 2.* still in a case of doubt we must more rightly presume in favor of the use of a promulgated law, and equally in favor of its first reception and the duration of its reception; for we must rather conjecture in favor of the obedience of the law by good subjects listening to the law, than that we should think they are despisers of the law, as long as that is not proved. *Mantica de tacitis et ambig. convent. libr. 5. tit. 13. num. 42. Gratianus d. cap. 559. num. 57. 58. 59.* and other authorities cited by *Menochius d. loco citat.*

41. This I certainly think is quite clear, that a law never received, and never observed, has no force, if a long time has elapsed since its promulgation, and the people has followed an observance of the older law against the disposition of the new law. *Menochius d. libr. 2. præsumpt. 2. in pr., Jacob Coren observat. 1. lit. y. et z. Andr. Gayl libr. 2. observ. 60. num. 3. Maevius ad. jus Lubecens. quæst. preliminar. 9. num. 75. Paulus Voet de statutis sect. 12. cap. 2. num. 2. 3.* For although a law is not abrogated by disuse only, as has been previously said in *num. 35. (ante)*, that by frequent acts, however, done contrary thereto, and not afterwards repudiated by the legislator, it loses its force *ab initio*, or is deprived *ex post facto* of the strength of its obligation is certain from what is there laid down. And thus everywhere throughout Holland we see *fidei commissæ* upheld, and the law given

in favor of the force of *fidei commissa* on things affected by the *fidei commissary* law, and of those claiming it, although in the public registry there was no mention made of it, as the Counts of Holland had laid down should be done, by their perpetual edict of July 30, 1624; and for no other reason than because no such registry of *fidei commissa* was ever fully brought into use from the time the law was first issued, as Groenewegen witnesses *ad l. ult. C. de jure dotium* (although elsewhere such law was not observed in a single place, as is elsewhere said).

42. Nor must it be thought that when a provincial law is solemnly promulgated, having been generally passed by the Counts of the Province for all their subjects, that this or that State can withdraw itself from the provisions of this law by a mere negligence or disuse of it, the remaining citizens of the other States remaining bound. But rather that those who do not think that such a law is conducive to their interests ought to lay the matter solemnly before the Counts, adducing their reasons, and thus obtain the abrogation of the law already made, or get a personal law for themselves, *arg. l. leges sacratissimae 9. C. h. t. (C. l. 16)*. *Jacobus Coren observ. 1. in pr. et versu, "want aangaande."* Many having followed this course, it was moderated in the year 1580. They were persuaded that the Scabinican law of intestate succession was not, according to their use, the law of their State; and in their favor, therefore, in the year 1599 a new law of succession, more resembling the old *Æsdomic*, was introduced by a new decree. Just as the Rotterdammers, on the 23rd December, 1604, obtained authority from the Counts that the right of representation in the collateral line should be extended as far as the sixth degree in their State, and the region belonging to it, when everywhere in the other States of Holland this right was not extended beyond the 4th degree.

43. As regards the proverb, "the reason of the law ceasing, the whole disposition of the law also ceases," you will only rightly admit that, when it is obvious that the whole reason of the law by which the legislator was moved, is completely wanting. If from the beginning many causes concurred, impelling the legislator towards giving his sanction to the law; which causes, singly considered, were sufficient to call for such a disposition of the law, and if then some of the causes ceasing, others still remained, it is more correct to think that the law does not thereby lose its aim or its power to be enforced, *arg. § affinitatis 6 et 7. Instit. de nuptiis (Inst. l. 10)*. *Joh. à Sande, decis. Frisic. libr. 2. tit. 9. defin. 20. in fine. Giurba ad consuetud. Messanens. cap. 1. gloss. 1. part. 1. num. 13.*

44. One other point remains to be discussed: what interpretation does a new law receive when it contains a manifest correction of a former law or custom? There are not wanting those who say "that then the power of the new law should be restrained within narrow limits," so that they contend that "the new correcting law should be kept within its own proper limits, not extended to other cases by equality of reasoning, or identity, nay, nor by greater applicability," as may be seen from what is alleged by *Jacob Coren observ. 38. num. 8. 9. 10*. But as it is not less certain of the new laws than of the old laws—indeed more true is it of the new laws than of the old, for the latter were more fully ventilated in use—that all provisions of the law cannot be comprehended in them, and therefore the whole nature of the law demands that, its reason being properly known and expressed,

or more certainly understood, it should be extended to similar cases, *l. 12. l. 13. ff. h. t.* (Dig. 1. 3) ; and as all law which is now passed new will in the future grow established, so that the laws to be now amended by a new law were once themselves new laws ; and as thus sound reason cannot do otherwise than counsel the extension of new laws to similar cases : hence, whenever the same, or a greater, reason prevails, in those cases there ought to be the same disposition of the law, as if, according to the intention of the legislator, it were comprehended in the same definition of the law. There is an example in the Roman law, viz., the Aquilian law, which had derogated from all laws applying to loss caused by injury (*damnum injuria datâ*) *l. 1. ff. ad leg. Aquil* (Dig. 9. 2), and itself only restrained damage occasioned "by the body and against the body," still it was extended *utiliter*, by the interpretation of the lawyers, to damage caused "to the body," but not "by the body." § *ult. Instit. de lege Aquilia* (Inst. 4. 3), *l. quia actionum 11 ff. de prescript. verbis* (Dig. 19. 5). Nor is it therefore to be denied that the interpretation of a new law, amending an old law, should be stricter, in so far that it should not allow an extension to other cases further than, to preserve the justice of the new law, it ought of necessity to be reduced to and comprehended under its dispositions : any other more free extension which can be avoided, the justice and reason of the new law remaining intact, altogether ceases, *arg. l. de emancipatis 13. § cum enim 2. C. de legitimis hered.* (C. 6. 58). *l. ult. in fine C. ad Senatusc. Tertullian.* (C. 6. 56). For since the vice of inconstancy is often wont to be injurious in its consequences, and since a changing without a new urging cause is to be condemned, it must be believed that the legislator is still of the same opinion which he formerly was, as long as the reason of the new law does not render its former reason useless or impaired. There is an example of this in *tit. de inofficioso testamento* as to the extension of novel. 118 ; and many examples occur in reference to intestate succession. And in this sense the proverb is true, "that those things which are not expressly found corrected should be considered as left to the rules of the old laws and constitutions," *l. præcipimus 32. § ult. C. de appellation* (C. 7. 62) : *Menochius de præsumption. lib. 6. præ. 38. Augustin. Barbosa axiom. juris usufrequent. 60. num. 3. 4. 5. 6. Zoësius ad Pandect h. t. num. 15. Vinnius ad § 3. Instit. de adoption. num. ult. in fine.*

TITLE IV.

OF THE CONSTITUTIONS OF THE PRINCEPS.

SUMMARY.

1. The people transferred its power to the Princeps; both its especial powers, and its general powers of making and abrogating laws, and making particular laws for some classes or individuals.
2. A Constitution of the Princeps was whatever pleased him should have force of law. Given by way of Edict, Rescript, Decree, Interlocutaries, Oratio recited in the Senate by the Princeps' representative as the foundation for *Senatus consultum*; Mandate, direction to Magistrates in the Provinces; Annotations; Pragmatic Sanction, answers to corporations and colleges.
3. Rescripts the most numerous: they are useless if obtained by untruth told or truth suppressed, or partly told, covertly and with dissimulation, or by a perplexed and confused statement. Such a person loses his request: and may be criminally treated.
4. If the rescript contained several chapters and the most material one was fraudulent, the whole falls; but if the chapters can stand separately, the good remain.
5. The rescripts are without authority if undated, and no consul's name attached, so that the Emperor might judge when obtained. For the Emperor cannot as a rule be supplicated during a lawsuit or appeal, nor after a sentence or compromise. Exceptions stated. Nowadays it is permitted to pray the Princeps for restitution even during a suit. Still the date must be affixed, signed and sealed in proper style. The originals are the evidence. Those rescripts which are contrary to law or injurious to the fisc are null, unless the Princeps intended to depart from the common law, pardoning a crime or granting that which benefits one and does not injure others.
6. Rescripts are invalid which take away the rights of third parties. *Dominium* cannot be taken away by the Princeps, nor injured. Nor can the Princeps weaken a peremptory exception by rescript, or give a debtor delay at the expense of an unsecured creditor, or rescind or weaken an obligation of compromise or contract; nor so act to his own or the fisc's gain. Is bound therefore by contracts with subjects, although not bound by solemnities. Cannot depart as a Princeps from his obligation as a man. Nor break faith, which is the more serious in a Princeps, the fountain of all right and protector from all wrong.

7. But in just cases the Princeps can take away a private right. As a punishment, where an estate, or a part, is confiscated. Or where public utility or necessity demand; satisfactory recompense being made. An owner must allow stones to be quarried on his land, for a consideration, both by custom and rescript law, for the construction or repair of public buildings. Public roads being washed away by rivers, or a chasm made, the neighbouring owner is compelled to grant a road through his property on payment. For a public manufactory, or the erection of another public work, the neighbouring houses may be razed at the authority of the Princeps. By our modern law *civico* magistrates, &c., can take private lands and houses for widening public walls, opening ditches, making drains, &c.: the price being paid to the owner: and this whether the Counts have granted a general or a special power.
8. It is not taking away a third party's right when buildings wrongly constructed are ordered to be razed, being built against public rules and deforming the public view. Or when built on a public road and interfering too much or dangerous to the public use. This is done against the law and is therefore a delict, so that the Princeps does not err in ordering their destruction. Private persons can force a wrongful builder to suffer a loss without hope of reparation or being able to ask for security against damage. Why not then the Princeps punish those who, without right, build contrary to public utility?
9. It is not the deprivation of an acquired right if the Princeps grant a private person the right of building on a public place. Who obtains such an authority is not doubtfully presumed to have obtained it to injure his neighbours, but he can get the express power so to do from the Princeps. A private person can build on his own property or give leave to another, or threaten danger to another perhaps obscuring his road or prospect, as long as there is no servitude to the contrary. So on like public grounds can the Princeps.
10. Still less is it the deprivation of an acquired right when the Princeps thus acts so as to prevent anyone abusing his property, or losing it, or exercising too great cruelty, or to save from an untimely demand from his creditor, or dissipating his goods. For it is to the interest of society that no one misuses his own. Thus prodigals are interdicted. Princeps can also grant a "delaying rescript" to a debtor whereby he takes away the power of action from creditors without diminishing their right, but rather with the view that they may still get their debt and not by hasty, angry execution lose the greater part. Such debtor must give security to pay whole debt, after certain time. Advantage is the creditor's.
11. Nor does the Princeps take away an acquired right by the grants of benefits and privileges. Three kinds which may injure another.
 1. When Princeps remits what his own or the *fisc*'s right. Instances given.
 2. By allowing a monopoly to discoverers, inventors, &c.
 3. Causes a third person to lose his right for public utility: such right being specially brought to Princeps' notice in the petition.
12. Privileges are divided into (a) personal or (b) real.
 - a. Granted to individuals and dying with them, not transmitted to heirs: granted also to classes of individuals but not to their heirs or successors, *e.g.*, wards' preference on tutors' goods for administration; wife's preference on husband's estate for dowry: husbands sued for dowry and others having *beneficium competentiae*, this does not pass to heirs.
 - b. Adhering to the thing, transmitted to heirs and successors, who have a delay of four months, as against *res judicata*. Funeral expenses action gives to heirs also of person burying another.

13. Personal privileges, not transmittable to heirs cannot be transferred by cession. Real privileges can. Outside of privileges it is not universally true that what can be transmitted to heirs can be ceded : but in real privileges it is so.
14. Where it is not certain if it is a personal or real privilege, see if it is gratuitous or not gratuitous. If gratuitous, it is assumed personal. If not gratuitous, it is assumed real ; and as made for benefit of donee and heirs. Odious privileges taken as personal : favorable as real.
15. Privileges, where not to individuals, but to classes of persons as wards, wives ; and to corporations, as to a village, town, region, or province. In Holland the Counts gave privileges to cities and provinces, for faithful adherence, assistance in war, pecuniary subsidies to the Counts or Fisc.
16. As to interpretation of privileges : if doubtful, follow the same rules as with laws. Explain the intention of the privilege by the petition made. As to whether interpretation strict or liberal, a distinction. Personal privileges strictly confined to persons or cases to whom granted. Even if there is same or greater reason in other similar cases : contrary, thus, to the general principles of law : unless there is a clear intention. Thus preference given to wards on tutors' goods, for administration, extended to curators of mad or prodigal wards, or otherwise afflicted in mind or body, although the edict contained no mention of such an extension. Preferences of wives for dowry extended to betrothed, and betrothed girls under twelve taken to husbands' houses considered as married. But where there was no intention the restriction was strict. If one enjoyed a privilege for him and his heir, and there was a doubt, the heir enjoyed it, but not the heir's heir. Privileges granted to corporations of workmen and artificers, commercial corporations, or students, are not enjoyed by merely honorary members.
17. If there is any doubt as to the person or class of privileges : inquire whether they contain anything repugnant to common law, or public utility, or derogate from the rights of third persons ; or from the rights of none, or only of conceder. If the former, the interpretation must be strict. A subsequent law, in derogation of a former, should be as strictly construed as possible, and *a fortiori* should a privilege, especially if burdensome. While it may be assumed that the legislator would not diminish a general right for a particular person, still where it is doubtful, the private right must yield to the public, and prejudice it as little as possible. Therefore even the privileges of the Princeps, which, when granted, do not derogate from the rights of third persons, afterwards do so from circumstances, they were, where doubt existed, held to have lost force and effect.
18. The interpretation must, however, not be so strict as to nullify the privilege or make it absurd or inept : or that the former privilege is destroyed by the latter, for the latter should rather be construed in commendation, than in diminution, of the former.
19. If derogates from the right of none, or only the conceder, and therefore a token of his liberality, the intention must be as liberal as possible. Much more if not given from mere liberality, but to reward services.
20. Privileges are extinguished : personal, by the death of the donee : real, by the loss of the thing conceded. Destruction or injury by war or violence of the enemy does not nullify privilege of a city, college or corporate body. It revives with the restoration of peace. But not so if it had happened by way of punishment for wrong.

21. Query if privilege ceases by revocation. Gail and Merula draw a distinction between the concessionary being a subject or no subject. In the former case they think the Princeps is not allowed to revoke : in the latter yes. But Voet says a Princeps is bound to keep faith with both. Princeps can revoke where he has acted from liberality, or granted indefinitely, or reserved a power in the grant to revoke, alter, or diminish. The tenure was therefore at pleasure, in which case there can be no injury done by the revocation or reservation, even without definite cause. A prudent Princeps will not rashly revoke, nor expose himself to the charge of vacillation or inconsistency. Therefore where there is a doubt, he is not presumed to have revoked. If the privilege was founded on a contract, or on an onerous obligation, a deed done or to be done, a gift present or future, or in reward for services often as valuable as money, the Princeps should not revoke, alter, or diminish in the plenitude of his power : there must be lawful and grave emerging cause of retraction : especially where the Princeps, in his concession, swore to maintain. Privileges obtained in fraud are cancelled, as already stated. If concessions to bodies of workmen and artificers are abused contrary to the tenor of the concession, and used to defraud other subjects, they are cancelled ; or if under pretence of a privilege the conessor makes his own law, contending with violence as to a privilege, rather than seeking the aid of the Judge : especially if the whole corporation allows such an abuse : if otherwise, the whole corporation should not suffer for the fault of a few of its members.
22. A privilege expires with renunciation : for everyone can renounce his lawful or favored right. Done expressly by words or contrary deeds, as by leaving one privileged college, and joining another not privileged. This renunciation must be strictly gathered, for such a renunciation is a sort of a gift, as it were, and no one is presumed to donate. Therefore where a particular act is done which might have been declined on the ground of privilege, as deviating therefrom but not altogether opposed to it, the privilege is not lost in other subsequent cases. If freed from taxes and impositions and public duties, and the tax is paid or duty done, it would be hard to conclude therefrom a surrender for ever. It is not so, and the inducing reason may have been the good of his country.
23. Where the privilege is that of a corporation, the renunciation or inconsistent acts of particular members do not derogate. For no one can alienate another's right, which in fact it would be here. Nor should the acts of a few injure a body. There are, however, privileges accorded to a corporation which individual members may renounce and thus lose for themselves only : unless it is a military or ecclesiastical privilege whereby the whole army or the clergy would suffer.
24. Query if privilege ceases by prescription ? If it consists in doing anything, or the exercise of an act, and it is not done during the period of prescription, it does not follow that prescription applies. For it may have been impossible and the requisites may have been wanting. There was thus no blame or negligence, which are the reasons of prescription. The road to a sepulchre cannot be prescribed because there was no one to bury for a long while. But if there was an opportunity of exercising the right, and the person did not exercise it for the whole period of prescription, the prescription would undoubtedly be lost.
25. The death of the Princeps does not extinguish a privilege of any kind, real, personal, absolute or temporary. Ordinarily, death revokes : but then a Princeps never dies. Therefore what is left to a Princeps goes to his successors, as to a dignity, unless of such a nature as to expire by death. What is revocable is not *ipso facto* revoked by his death, but the power of revocation passes to his successor.

26. If a privileged person, college, municipality, or city is violently hindered in its exercise, he or it should not proceed to arms, or return violence, but repair to the Judge and protect his right, by obtaining possessory remedies. If one State violates the privilege of another State, appeal to the higher tribunal.

1. When by the Kingly law (*lex regia*) the people had transferred all its rule and authority to the Princeps, it is not surprising that he had the same power as the people anciently had. And thus as in the free republic a father of a family made his will in the presence of the people without any solemnities, so afterwards, as the Princeps had his conscience as a witness, that appeared to overcome the solemnities of all testimony, *l. omnium* 19. *C. de testamentis* (C. 6. 23). And as the people had the right to make laws, to abrogate laws passed, or to release anyone from the chains of the law by a personal right accorded, so it is without doubt that thenceforward the right of passing and of taking away law rested with the Emperor, *l. 3. in fin. ff. de offic. praetoris* (Dig. 1. 14), *l. 1. ff. h. t.* (Dig. 1. 4), § *sed et quod* 6, *Instit. de jure natural. gent. et civili.* (Inst. 1. 2). For what Ulpian wrote concerning the proconsul in the provinces, *l. si in aliam* 7. § *ult. ff. de offic. procons. et legati* (Dig. 1. 16), namely, that he had the fullest jurisdiction and power of all administering the law, whether as Magistrates or as vested with extraordinary powers, that Dion Cassius more fully lays down in his *Histor. libr. 53. pag. mihi* 507. 508., concerning the Roman princeps, for he shows that they exercised their rule with the aid of those dignities which had flourished in a free republic, and whose titles they did not despise, for instance consul, censor, pontifex, tribune. [Here the author gives a long passage from Dio Cassius, which it is considered unnecessary to translate in full, as it is merely confirmatory of the proposition stated; and moreover the power of the Emperors is now obsolete. It can be consulted by a reference to pp. 28. 29. of the text]. And although it not unfrequently happened that two or three Emperors ruled at the same time in Rome, as partners or colleagues in the Imperial Majesty, it must not be believed that the monarchical rule was interrupted, "for there is very properly said to be but the governance of one (as the same Dion Cassius *d. libr. 53.* says), although two or three "had the management of affairs."

2. A constitution of the Emperor is what the Emperor pleased should have the force of law. He was accustomed to announce this in many ways, as by way of EDICT, RESCRIPT, DECREE, *l. 1. § 1. ff. h. t.* (Dig. 1. 4), *d. § 6., Inst. de jure natur. gent. et civili* (Inst. 1. 2), and Theophilus in his paraphrase thereupon. Or by way of INTERLOCUTION, which was a simple pronouncement of his wish without any solemn form, *d. l. 1. § 1. ff. h. t.* (Dig. 1. 4), joined to *l. 1. § quæri possunt* 5. *ff. ad Senatusc. Turpill.* (Dig. 48. 18). Or by ORATION which the officers of the Princeps were accustomed to recite in the Senate, that a *Senatus consultum* might be made according to his view, *l. unic § 2. et ult. ff. de offic. quæstor.* (Dig. 1. 13), *l. 1. ff. de rebus eorum qui sub tut. vel cur. sunt* (Dig. 27. 9), *l. 1. § 1. ff. de tut. et curat. data ab his.* (Dig. 26. 5), *l. 3. ff. de donat. inter vir et uxor* (Dig. 24. 1). By MANDATE, which he gave to those presiding over or representing him in the provinces or sent to do other duties there, that they might administer what was committed to them in a praiseworthy manner, *tit. Cod., de Mandatis Principum novell. 17. et 114. Lamb. Goris ad l. 19. ff. de*

officio præsidiis, verbo unde mandatis adjicitur, post adversaria. Adde Carolum Eman. Vissanum, tract. de Mandatis Principum. By SUBSCRIPTIO or ADNOTATIO, in which he answered as briefly as possible the letters in which private persons made requests, *l. 1. C. de diversis rescriptis et pragmat. sanct. (C. 1. 23), l. 5. C. ad leg. Corn. de Sicar. (C. 9. 16), l. 3. C. de prescript. 30. vel 40. annorum (C. 7. 39), l. 2. C. de bonis vacant. (C. 10. 10), l. 6. C. de precibus Imperator. offer. (C. 1. 19).* The form and tenor of this subscriptio *Brissonius* gives *antiquitat. select. libr. 3. cap. 7.* And lastly by a PRAGMATIC SANCTION, in which he fully wrote in answer to the requests of bodies and colleges and concerning their public matters, calling in the counsel of pragmatics or learned men, *l. ult. C. de diversis rescript. et pragmat. sanct. (C. 1. 23), l. ult. C. de proximis sacrar. scriniorum (C. 12. 19).* Concerning these see, more fully, the Commentators *ad § 6. Inst. de jure nat. gent. et civili.*

3. Among all the kinds of Constitutions none are more frequent than rescripts: which however can become useless from many causes: for instance if they have been obtained by subreption or obreption, *i. e.*, by an express falsehood in the statements of the supplicating petition, or by a suppression of the truth, which, had he known it, would have led the Princes to give a different rescript. Or by a partial expression of the truth, but made in an involved and crafty form of words so as to dissimulate: or by a confused and perplexed narration of facts, so intricate that it escaped the deliberate notice of the Princes. *Menochius de arbitrar. judic. libr. 2. casu 101. num. 9. et casu 202. num. 10. et seqq. Andr. Gayl libr. 1. observ. 14. num. 4. 5. Jac. Coren. observ. 27. num. 131. 132. et seqq.* Such a wicked and lying supplicant ought not merely to lose what he has obtained, even if he had got a sacred response according to the laws: and, it is also laid down, should, if he be found to have been lying too wickedly, be subjected to the special severity of the Judge, indeed be accused of the crime of falsity, *l. et si non. 4. l. 5. C. si contra jus vel utilit. publ. (C. 1. 22), l. si quis obrepperit. 29. ff. ad leg. Corn. de falsis (Dig. 48. 10).* Those Judges being fined in addition, who will not allow the charge of falsity to be argued, *l. puniri 3. C. si contra jus vel util. publ. (C. 1. 22).* For in all rescripts, although not found so expressed, the condition is however understood "if the prayer of the petition be founded on truth": whether they are rescripts of *justice*, that is such as refer to the cognition and definition of a cause; or of *grace*, which include besides the common law and the remission of a perpetrated crime, either the concession of a benefit or kind of monopoly to an artificer or workman as the reward of a new invention, as is at very great length shown by *Jac. Coren. observat. 27. num. 85.* and many other following numbers to the end. For although there can be no disputation allowed as to the power of the Princes, and whoever does so doubt is guilty of sacrilege as laid down in *tít de legib. num. 25 (ante)*, still liberty to discuss as to his will and knowledge is not denied: inasmuch as he cannot be considered to have wished who was misled by false and erroneous statements, and, prevented by a multitude of business affairs from inquiring minutely into the truth of what was stated, and thus issued his rescript. *Andr. Gayl libr. 1. observ. 14. num. 6. et 7.* So that it is incumbent on the Judges, by whom such rescripts are to be admitted and confirmed, to inquire into their truth, so that if no cognition, but execution, were ordered by the rescript, the fraud of the petitioner being detected on examination, the whole matter should then be taken cognizance of, *l. et si non 4. C. si contra jus vel util.*

publ. (C. 1. 22). cap. 2. extra. de rescriptis. Andr. Gayl d. libr. 1. observ. 14. Groenewegen ad l. ult. C. de diversis rescriptis.

4. If many heads are contained in a rescript obtained by obreption, and one of them is principal and the others accessory, if subreption have been committed with regard to obtaining the principal, that also renders useless what is considered accessory : for the accessory follows its principal and cannot subsist without it. It is otherwise if different chapters in a rescript stood individually therein and by themselves, not mutually dependent on each other : for then the rescript ought to be considered void and vitiate only as regards that part which evidently was obtained by obreption, the remaining chapters which do not labor under the like fault remaining in full vigour : so that the useful perish not with the useless, when it can be separated therefrom. *Andr. Gayl d. libr. 1. observat. 14. num. 5.*

5. Personal rescripts which have neither date nor consul's name, are also wanting in authority, *5. l. si qua 4. C. de divers. rescriptis (C. 1. 23).* For as it was not free to petition the Emperor at every time, as for instance not during the pendency of a lawsuit, nor pending an appeal, much less after a definitive sentence or a compromise, thus opening up settled questions ; unless any one of plaintiffs who are joint either asks the issuing of a sentence or that a judge may be joined to another judge so that a lawsuit may be terminated or a sentence carried forward, *l. 1. 2. 3. C. ut lite pendente vel post provocacionem aut definitiv. sent. nulli liceat Imperatorem supplicare (C. 1. 21), l. ult. C. sententiam resc. non posse. (C. 7. 50), l. causas 16. C. de transact (C. 2. 4), novell. 113. cap. 2.* Without the addition of a day or consul it cannot be adjudged whether anyone obtained the aid of an imperial rescript by a petition lodged in a legal or illegal time. And although nowadays it is allowed to petition the Princeps even during the pendency of a lawsuit, whenever anyone wishes to ask the benefit of restitution,—see *Zypeus notit. juris Belgici tit. de in integr. restit. in fine*, still I do not think that on that account we should depart from the ancient law requiring the addition of the day in rescripts, since such addition of the day can be of service in proving the falsity of the rescript, and for other purposes. Rescripts which are not armed with the signature of the Princeps are equally wanting in authority, or are not painted or marked with the prepared purple, *l. sacri affatus 6. C. de divers. rescr. et prag. sanct. (C. 1. 23)*, as to their marking, *Pancirollus de rebus deperditis libr. 1. tit. 2.*, and there also *Salmathius in notis*. The consequence of which is that it is not the copies of the rescripts, but those authenticated and themselves original which furnished proof, *l. sancimus 3. C. de et divers. rescript. prag. sanction. 1. 23*. Those also are considered inefficacious which are contrary to law or injurious to the fisc : it is laid down that these must be rejected by all judges, *l. nec damnosa 3., l. rescripta 7. C. de precibus Imperat. offer. (C. 1. 19), arg. l. jubemus nullam 10. C. de sacros. eccles. (C. 1. 2.)*. Unless it is manifestly clear the Princeps from his certain knowledge wished to recede from the common law, by condoning a crime to those petitioning, or granting such things as cannot hurt others and yet can benefit the petitioner, *d. l. 7. C. de prec. imp. off. tot. tit. ff. (C. 1. 19), et C. de sentent. passis et restit. (C. 9. 51).*

6. Rescripts are also invalid which take away a right acquired by a third party : for the power of owners over their property should be unshaken, nor ought anyone's right to be taken from him by the Princeps, nor can benefits be conceded to another's injury : this the

rescripts of the Emperors themselves dictate, §. *ult. Instit. de his qui sui vel alien. juris.* (Inst. 1. 8), *l. nec avus 4. C. de emancip. liberor.* (C. 8. 49), *d. l. rescripta 7. C. de precibus. Imperat. offerend.* (C. 1. 19). For which reason the Emperor cannot by his rescript even weaken a peremptory exception, *l. quoties 2. C. de precib. Imperat. offerend.* (C. 1. 19). Nor can he grant delay to a debtor, to a creditor's prejudice, nor to one not giving suitable security, *l. universa C. de precib. Imp., off.* (C. 1. 19), nor rescind nor weaken an obligation acquired by lawful compromise, nor any other contract: nor resuscitate a settled lawsuit. *l. causas 16. C. de transaction.* (C. 2. 4), *l. de contractu 3. C. de rescind. vend.* (C. 4. 44) nor for his own benefit, or that of the fisc *d. l. 3. in fine.* A consequence of this is that the Emperor is himself bound to fulfil contracts which he has entered into with his subjects. For although it is agreed from what is said in *tit. 3.* that the Princeps is not bound by the solemnities of agreements, still he cannot resile at his own discretion from, and by the plenitude of his power evade, an obligation which was willingly entered into by him according to the principles of the law of nature and of the law of nations, and which binds him, not as a Princeps, but rather as a man. For the right to the thing contracted for, and the power of suing arising out of the contract would be thus lost to the party with whom the Princeps contracted. I need hardly say that to break faith is a serious matter, even among private persons, *l. 1. ff. de constit. pecuniâ* (Dig. 4. 18): how much more serious, then, should it be considered in the Princeps so to do. In him all constancy of word and deed ought to be conspicuous: from him, as from a fountain of all justice and equity, and one animated by law, all idea of defrauding ought to be far distant, and also all iniquity. *Everhardus in loco, a plenitudine potestatis. Neostadius Curiae Holland. decis. 15. Ant. Mattheus de auction. lib. 2. cap. 11. num. 2.*

7. Yet it is not at all to be doubted that, for just cause, a right can properly be taken away from a private person by the Princeps; whether this be by way of penalty, as an estate being wholly or partly confiscated for crime, or the necessity of the public good demanding it, provided that in such latter case an equivalent be given which will repay loss of the thing or right taken away, and by which the right of ownership will be diminished as little as possible, *l. venditor 13. § 1. ff. commun. praedior* (Dig. 8. 4); *l. 2. C. pro quibus causis servi pro præmio* (C. 7. 13), *l. si quando 9. C. de operibus public.* Without the consent of the proprietor, stones may be cut from his quarry, payment being made as laid down by custom or rescript, provided the public necessity for constructing or repairing buildings demands it, *d. l. 13 § 1. ff. commun. praedior* (Dig. 8. 4). If the public roads are washed away by the swiftness of the river or by a chasm the nearest neighbour is bound, on receiving remuneration, to allow a road through his property, *l. si locus 14. § 1. ff. quemadm. servitut., amitt.* (Dig. 8. 6), and there *Gothofredus in notis.* In like manner, by authority of the Princeps, it may be decreed that the neighbouring houses may be broken down for the purpose of constructing the public workshops or any other public work, *d. l. si quando 9. C. de operib. public* (C. 8. 12). It is also allowed by our laws nowadays (i.e. Dutch law) that both the buildings of private persons and their lands may be taken for public use by the State magistrates or the prefects, on paying their value to the owner, for the purpose of buildings walls, widening ditches, making ducts, making or repairing mounds; whether these officers are armed for that purpose with a general privilege from the Counts, clothed with power, or specially obtain from them the power to do this in

certain cases. *Hugo Grotius monuduct. ad Jurisprud. Holland libr. 2. cap. 32. num. 8. Responsa Juriscons. Holland. part. 1. consil. 184, et part 3. vol. 1. consil. 143 in med.*

8. Nor does he appear to take away his acquired right when he orders wrongly constructed buildings to be destroyed: buildings perhaps constructed contrary to the public form and deforming the public aspect, or put up in a public street, interfering too much with public use, or narrowing streets or the breadth of the gates, or such as are so adjoining the public walls or other public works that the neighbourhood may dread fire or treachery from them, *l. aedificia 14. C. de operibus publicis (C. 8. 12), l. 2. § si quis nemine 17. ff. ne quid in loco publ. (Dig. 43. 8), joined to l. sanctum 8. § ult. ff. de rer. divis (Dig. 1. 8), l. 2. § 3. ff. ne quid in loco sacro (Dig. 43. 6).* For those who put up such buildings do not act according to law, and, if I may so express myself, commit a delict in doing it, and thus the Princeps certainly does not err in ordering their destruction, *arg. l. 1. § ult. ff. ne quis eum, qui in jus. vocab. vi eximat (Dig. 2. 7).* As he who illegally builds, is compelled to suffer damage done by private persons without the hope of its reparation, having even no liberty to demand security that no damage be done, *l. qui bonâ fide 13. § si quis juxta 7. ff. de damno infecto. (Dig. 39. 2),* why should not the Princeps punish according to the damage done to the buildings they have raised, those whom he has found building without any right, and against the public utility?

9. It is not the deprivation of an acquired right if the Princeps gives to a private person the right of building in a public place, even to the damage of his neighbours, for one who simply obtains permission from the Princeps "that he may build in a public place," is not considered, where there is a doubt, to have obtained permission that he should act to the disadvantage of his neighbours, for he could specially have obtained that permission from the Princeps, as Ulpian lays down, *l. 2. § merito 10 et seqq. et § si quis a Principe 16. ff. ne quid in loco publ. vel itinere fiat (Dig. 43. 8).* For, as a private person can build on his own ground, or can concede to another the right of building, even although he may threaten damage to another, by obscuring his light or obstructing his prospect, provided there is not established a servitude as to not interfering with such light or prospect, so who can deny to the Princeps the like right in regard to public places, a right by which he himself, or another by concession from him, shall build in a public place to the detriment of his neighbours who have no right, as no servitude has been established in their favor, of stopping such works, and thus no injury has been done to them. Although there are not wanting some who are of opinion that the words *nisi forte quis hoc impetraverit in d. l. 2. § 16* refer to neighbours who have obtained, not from the Princeps, but from their own neighbours this right of building to their detriment. This, however, I do not think agrees with the first words of the paragraph which treat regarding him who has simply obtained a building concession from the Princeps, in opposition to him who has obtained such right, not simply, but to the detriment of his neighbours.

10. Much less does it the savor of the loss of an acquired right when the Princeps so acts that a person should not abuse his property or lose it, whether by exercising too great a cruelty, or by demanding his debt in an untimely manner, or by dissipating his substance; for it is to the interest of the Republic to see that no one misuses what is his own, § 2. *Instit. de his qui sui vel alien. jur. sunt. (Instit. 1. 8).* On this ground not

only are prodigals rightly interdicted from the administration of their goods, but even masters were ordered to sell, on favourable conditions, slaves whom they treated too harshly, and those who were affected with an unbearable injury, *d. § 2*. The justice of rescripts granting delays is also defended, i.e. giving indulgence to debtors, although the Princes thus takes away from the creditors, for a time, their power of proceeding. It should not seem that he thus diminishes their rights, but rather that he gathers up, safely, the whole right of the creditor, when, by untimely execution or one precipitated by the warmth of his anger, he would lose a great part of such right. For the Princeps does not make this concession to overburdened debtors in any other way than this, that they should, by giving sureties, interpose a suitable security that they will pay the whole debt after the lapse of a certain time: so that you may rightly say that by defending the debtors with such a rescript you study no one's benefit more than of the creditors themselves, *l. universa 4. C. de precibus Imp. offerendis (C. 1. 19), l. ult. C. qui bonis cedere possunt (C. 7. 71)*.

11. Nor, lastly, does the Princeps take away an acquired right by conceding benefits and privileges. For although it was anciently forbidden to bestow privileges on private persons, and it was thought right that laws should not extend to particular individuals but to all subjects, as is said in *tit. de legibus, num. 5 (ante)*, it is clear this was altered in later times, *§ sed et quod 6. Instit. de jure natur. gent. et civili (Inst. 1. 2), l. 1. § ult. ff. h. t. (Dig. 1. 4), l. privilegia quaedam 196. ff. de reg. juris (Dig. 50. 17), l. quod vero contra 14. ff. de legibus (Dig. 1. 3)*. Nor was, on that account, as I have said, any right taken away by the Princeps conceding particular rights in regard to any person, thing, or cause. That this may the more fully appear, I think it must be borne in mind that besides those benefits which are more properly called the benefits of the Princeps, and which hurt no one, there is a triple species of privileges by which it may seem that anyone is injured. For there are those to whom the Princeps remits only his own right, or the right of the fisc, and thus injures himself; when, for example, he grants to certain persons, or to certain bodies of men, an immunity from tribute, taxes, and other similar public burdens and duties; or remits the payment of certain fines and penalties due to the fisc; or permits private persons to enclose, protect, or dry up, desert lands, lands gained by alluvion, or long under water, and therefore acquired by the fisc: of which class of benefits not a few are granted. There are other benefits which, by a peculiar favour, are only granted to certain persons, viz., to exercise, by way of monopoly, this or that kind of trade, workmanship, or merchandize, which they had thought out with much industry, or, after it was already invented, had more fully developed, or had by their own cost and danger made more useful and fruitful. To this class must be referred the power given to the East and West India Companies to carry on business in those regions, to the exclusion of others who are not their partners. Also those concessions which it is the custom to grant to the inventors of new things, to printers publishing valuable works, and many others of that kind. There are other concessions by which the right of a third person is taken away by law or by a directly acquired benefit. As regards the first-named species of concessions, since the Princeps only renounces his own right, you look in vain there for any loss to a third person. With regard to the second species, although all hope of making gain from a

certain craft or trade is cut off from most others other than persons or societies gifted with the privilege, still an acquired right cannot be said to be taken away from them: but rather that in some persons the hope of making gain which they had acquired by the industry often of many years, and by risk and cost to their estate, is considered strengthened by the privilege thus acquired: so that such hope of gain remains intact, on principles of natural equity and the rules of law, with those who first exposed themselves to the fear of loss: just as it is generally said that they shall wear the honors and rewards who have made poetry, and those who have ploughed for themselves and not for others, and prepare for themselves the honey and the nests. In the third species of privileges the ademption of an acquired right is supposed to be included, but still it is true that it will not be conceded by the Princeps to anyone to the injury of another, unless public necessity counselled it, or a great utility, and therefore it is not conceded except under such circumstances, and such requisites, as enable the Princeps to take away, by the plenitude of his power, a right acquired by a third party, as is laid down above, *arg. l. 2. § merito 10. ff. ne quid in loco publico vel itin. fiat.* (Dig. 43. 8). "To grant a benefit to one person to another's injury is not our custom," say the Emperors in *l. nec avus 4 C. de emancip. liberor.* (C. 8. 49). *Hugo Grotius, introd. to Dutch jurisprudence lib. 1. cap. 2. num. 21. 22. Responsa Juris. Cons. Holland. part 1. cons. 205.* Whence, in order to obtain such privileges as would take away the right acquired by another, it is necessary that anyone wishing to obtain them shall nominately set forth the rights of others in his petition: and shall narrate therein such anterior rights and privileges as may seem to show that others have already obtained an acquired right: so that thus the Princeps (who probably is indeed presumed to know the universal laws, but not peculiar statutes, customs of particular places, or privileges granted to private persons) may be very fully informed from these facts stated and may decree a privilege from his certain knowledge, without obreption, after having also heard those whose rights are to be taken away or diminished by the privilege sought. *Menochius de arbitrar. judic. lib. 2. casa 101. num. 136. 137. 138. et seqq.: Jacob Coren observ. 27. num. 147. et seqq. ad num. 153. Responsa Jurisc. Holland. part 1. consil. 205.*

12. Privileges are divided in those granted to a person, and those granted to a thing or cause. Personal servitudes, which are conceded to a person are extinguished with his death, and do not pass to his heirs. Real or cansal privileges cohere to the thing, and are transmitted to heirs and other successors, *l. privilegia 196. ff. de reg. juris* (Dig. 50. 17), *l. ceterum 3. § 1., l. forma 4. § quamquam 3. ff. de censibus* (Dig. 50. 15) *l. immunitates 4. ff. de jure immunit.* (Dig. 50. 6) *l. exceptiones 7. pr. et § 1. ff. de exception.* (Dig. 44. 1). Personal privileges are not only those which are given to one person, but also those which by a general law are conceded to a whole class of particular persons. Thus the privilege given to pupils for the administration of their tutelage, to a wife for the recovery of her dowry, as among the creditors of a guardian or husband, gave a preference to them alone and not to their heirs or other successors, *l. dabimusque 19. § 1. ff. de reb. auctor. jud. possidend.* (Dig. 42. 5) *l. unic. C. de privilegio dotis* (C. 7. 74) *§ fuerat 29. Inst. de action,* (Inst. 4. 6), *l. ex pluribus 42. ff. de admin. et peric. tutor.* (Dig. 26. 7).

the benefit of condemnation according to competence given by

laws to husbands only summoned for dowry, and to others, only benefits those to whom it is given and never their heirs, *l. maritum in id 12. et l. l. seqq. ff. soluto matrimo* (Dig. 24. 3). *l. et si fidejussor 24. § 1. et ll. seqq. ff. de re judicatâ* (Dig. 42. 1) *l. exceptiones 7. pr. ff. de exception. præscr. et præj.* (Dig. 44. 1). Whereas, on the contrary, real and causal privileges are not granted to one only but are granted generally, as is openly admitted: for the privilege of a delay of four months which is attached to the action on a judgment brought against those so condemned by judgment, benefits not only those who are themselves condemned but also their heirs and successors, *l. tempus 29. ff. de re judicatâ* (Dig. 42. 1), and the privilege attaching to the *actio funeraria*, attaches, on religious grounds, not only to the person burying but his heir also has the *utilis actio*, as is laid down in *tit. de religiosis* (post).

13. Personal privileges neither pass to the heirs, nor are transferred to another by cession of right or of action: for in this way they would pass away from the person, contrary to the intention of the party making the concession, *d. l. ex pluribus 42. ff. de admin. et peric. tut.* (Dig. 26. 7). *Tyraquellus de retractu convent. § 1. gloss. 6. num. 12.* On the other hand, if privileges attach to things or persons or actions, there is nothing to prevent their passing by cession: for when a class of actions give rise to the benefit, he on whom their prosecution devolves will not be without its help, *l. omnibus 68. ff. de regul. juris* (Dig. 50. 17), *d. l. tempus 29. ff. de re judicata* (Dig. 42. 1). And although perhaps it is not universally true beyond the case of privileges that what can be transferred to heirs can also be transferred by cession, still since real or causal privileges are so called because they appertain to and are contained in the thing or cause itself, it is fair that whenever the thing itself or the action is ceded, the privilege inherent in it is also taken to be transferred by cession. *Vide Tyraquellus de retractu gentilit. et 26. gloss. 3. num. 29: Ant. Matthæus de auction. libr. 2. cap. 6. num. 31. 32.*

14. If it be not quite clear whether a privilege granted is given to a person only or to a cause: that point must, it is thought, be decided according to whether it is an onerous or a gratuitous concession. *Andr. Gayl libr. 2. observ. 2. num. 13 et seqq. Ant. Matthæus de auction. libr. 2. cap. 7. num. 50:* so that what is given gratis is in doubtful cases reckoned among personal privileges, and, on the other hand, onerous privileges are accounted real: because everyone is presumed to have contracted for himself and his heirs, *l. si partum 9. ff. de probatione* (Dig. 22. 3). But since neither contract nor onerous cause ought to impede the restriction of what is hateful and injurious, especially if it be granted by way of privilege, and inasmuch as favour itself and a gratuitous concession are often the results of desert, calling forth the benevolence of the Princeps quite as much as money counted down in a contract: therefore it is rather to be ascertained whether the contents of the privilege are favourable and not injuring the public utility and the rights of third parties, or whether, on the contrary, they are odious and granted to the prejudice of rights acquired by third persons. In the former case, inasmuch as benefits which proceed from the indulgence of the Princeps ought to be interpreted as widely as possible, it must be presumed that they are rather real than personal, *arg. l. beneficium 3. ff. h. t.* (Dig. 1. 4). In the latter case, where there is matter of doubt, they should more correctly be considered personal, for odious concessions ought not to be aided by more benignant interpretation,

arg. l. cum. qui dam. 19 ff. de liberis et posthumis (Dig. 28. 2) *l. 2. § merito 10. et § si quis a Principe 16. ff. ne quid in loco public.* (Dig. 43. 8). *Zoësius ad Pandect. h. t. num. 18. My father Paulus Voet de statutis sect. 2. cap. 3. num. 7.* It cannot however be denied that it is often to be determined by different other circumstances connected with persons and things, whether the privilege is a personal or real one, as Menochius shows by many examples, *de præsumption. libr. 3. præs. 103.*

15. As in the Roman law privileges are made mention of as being not only given to certain persons, but to a certain class of persons, as to wards; and others as being given to certain bodies of men, as for instance to the citizens or inhabitants of a village, town, country or province, *l. 1. § ult. ff. ad municip.* (Dig. 50. 1): *l. non tantum 17. § 1. et seqq. ff. de excusation, tutorum.* (Dig. 27. 1): *l. forma 4. § quamquam 3. ff. de censibus.* (Dig. 50. 15); so also the same thing is frequent among many nations, especially in Holland: which no one can deny unless he is clearly a stranger among us. It is agreed that at many times and in many ages very many privileges were granted by the Counts of Holland to many States, and even to a whole province, whether on account of good faith well shown, or of war strenuously waged, or of extraordinary subsidies well given when the Counts asked for them, or of money lent to the fisc labouring under a want of money: these considerations being as it were the price of a particular law bestowed: so that you may rightly say that the municipal laws of each State form a not contemptible part of the privileges granted by the Counts, also the political laws for the rule of citizens: all these are gathered in different volumes by different writers. *Hugo Grotius introducet. to Dutch jurisprudence libr. 1. cap. 2. num. 20. 21. et seqq. Merula praxi civili libr. 1. tit. 4. cap. 3. Responsa Jurisc. Holland. part 2. consil. 10. versu. ten vijfdén.*

16. As regards the interpretation of privileges: if there is any doubt as to the sense of the words, what has been said concerning the interpretation of laws in *tit. 3. (ante)* is likewise to be applied here. Nor would it be unreasonable, when privileges have been obtained by a former petition, to seek an explanation and gather the sense of the privilege granted in the words of such former petition. *Jacobus Coren, observ. 27 post num. 112. Surdus decis. 291 num. 15.* If the question be whether privileges shall receive a strict or a wide interpretation, this cannot be defined without a distinction. For if the privileges in question are the particular rights of a certain person or thing, or even conceded with reference to a body of men, they in so far necessarily need a strict interpretation that they should not be extended beyond the persons or cases for which they were introduced: even if in some persons or causes the same, or a greater, reason may be found. For although in the common law, written for all subjects, the maxim holds good "that the same provision of the law ought to be admitted in cases not expressed but in which the same or a similar reason prevails and thus we should extend it to similar cases, *l. 12. 13. ff. de legibus* (Dig. 1. 3), yet this is not approved in regard to privileges, for it is wholly prohibited that they should be taken as examples or extended to similar cases, *§ sed et quod 6. Instit. de jure natur. gent et civil* (Inst. 1. 2), *l. 1. § ult. ff. h. t. l. quod vero 14. ff. de legibus* (Dig. 1. 3). Unless it can be gathered from evident circumstances that it was the intention of the grantor that the force of the privilege should be extended to persons not specially enumerated. For which reason when a

preference was given by the edict of the prætor to wards, upon the goods of their tutors for the administration of the guardianship, curators were on the analogy of wards granted to madmen and prodigals and others fettered in the administration of their defects by vices of the mind or body : all these also had, according to practice, a preference on the goods of their curator, although there was no mention of it in the edict, *l. et mulieri* 15. § 1. *ff. de curat. furios. et aliis extra min. dandis* (Dig. 27. 10) : *l. dabimusque* 19. § 1. *et l. seqq. ff. de rebus auctorit. jud. possidendis* (Dig. 42. 5). And as the privilege of preference was given to women for recovering their dowry, so we read that it was also extended by the interpretation of the lawyers to those betrothed, and to girls under twelve years of age taken into the house of their husbands and considered as in the place of wives : since it is to the interest of the republic that they also should obtain their whole portion so that they may marry, *l. quæsitum* 17. § 1. *l. 18. ff. de rebus auctor. jud. possid.* (Dig. 42. 5), *l. si sponsa* 74. *ff. de jure dotium* (Dig. 23. 3). But where circumstances of this nature are wanting, it is a firm principle that personal laws do not go beyond the persons comprehended in the privilege. Whence, if anyone has got a privilege for himself and his heir (in the singular number) where there is a doubt the first heir will enjoy it, but not the heir of that heir, *arg. l. antiquitas* 14 *C. de usufructu et habit.* (C. 3. 33). *Tyraquellus de retract. conventiones.* § 1. *gloss. 6. num. 18.* In the same way privileges which were conceded for the exercise of a craft, workmanship, business, or studies, you cannot rightly claim for those who are only entered in name as belonging to the college favoured by a particular law, *l. si duas* 6. § *et utique 4. ff. de excusatione tutor.* (Dig. 27. 1), *Joh. Papon. libr. 7. tit. 7. arres.* 15 : *Andr. Gayl libr. 2. observ.* 118. *num. 8. 9. 10. et seqq.*

17. It is clear that as regards the persons or causes themselves comprehended in a privilege, we must inquire whether those things contained in a privilege granted, are repugnant to the common law or to public utility or take away a right acquired by a third person (proper limits being fixed). Or whether on the contrary they diminish the rights of none, or of only the grantor. For if anything seems to be taken from the public law, or from a right acquired by another, you will rightly apply the strictest interpretation, so that you derogate as little as possible from the common law, and the rights gained by third persons. As later laws passed for the whole people are to be so explained in case of doubt that the old law be overthrown as little as possible, much more must that rule be observed in regard to privileges which are introduced against the common reason of the universal law, *arg. l. id quod vero ff. de legibus* (Dig. 1. 3) : especially when it is clear they are odious privileges which are granted against the public utility and the public laws, asserting also and strengthening the rights of individuals, and therefore to be restricted by interpretation to their particular case, *arg. l. cum quidam* 19. *ff. de liberis et posthumis* (Dig. 28. 2). *Didac. Covarruvias* 1. *resolutionum cap. 17. num. 13. in fine.* *Andr. Tyraquellus de retractu. in præfat. num. 62. 63.* *Grotius de jure belli et pacis libr. 2. cap. 16. num. 12.* *Zoësius ad Pandect. h. t. num. 21.* For although it is true that personal laws are passed by the authority of the legislator against the tenor of the common law, and on account of some public utility, and although to that extent the legislator is presumed not to have wished to lessen, without just cause moving him, the right belonging to another by the public law, *l. jus singulare* 16. *ff. de legibus* (Dig. 1. 3) : yet since in a case of doubt it is right

that the benefit of every private person should yield and be postponed to the public utility, therefore this rule will hold, that where privileges primarily favor only certain persons or causes, they will, in doubtful cases, operate with as little prejudice to the common law as possible. And thus it is that those benefits, conceded by the Princeps, which at the time of their concession involved detriment to no third person, in case of doubt will lose their force whenever by supervening circumstances they begin to be injurious to third persons, and thus are inequitable, *l. ex facto* 43. *ff. de vulg. et pupill. substit.* (Dig. 28. 6).

18. But privileges must yet not be so closely narrowed that they will be of no force, and have no operation against the common law, *l. 1. § ult. ff. ad municipalem* (Dig. 50. 1), or that they would have an absurd or inept sense. *Grotius de jure belli ac pacis. d. libr. 2. cap. 16. num. 12*, or, lastly, that a former privilege should be taken away by a later; for in a case of doubt the latter one ought to be so taken, that it is understood to be an addition, and an augmentation, rather than a diminution, of the former privilege, *l. 2. C. de praepositis agentium in rebus* (C. 12. 21).

19. But if, on the contrary, nothing is taken away from the rights of anyone, or only from the rights of the grantor, by the privileges thus granted, such benefits, proceeding as they do from the mere kindness of the Princeps, should receive as full an interpretation as possible, as stated in *l. beneficium* 3. *ff. h. t.* (Dig. 1. 4); *l. si quando* 2. *C. de bonis vacant.* (C. 10. 10). *Grotius de jure belli ac pacis libr. 3. cap. 21. num. 14. et seqq. et libr. 2. cap. 16. num. 12. Zoësius ad Pandec. h. t. num. 22.* This should hold good so much the more when it is agreed that the benefits were conferred, not from a mere desire of the Princeps to do a favor, but on account of dessert, or even of a kind of nominate or innominate contract; because all remuneration, even in matters which are otherwise of strict law, seems to be aided by a fuller and milder interpretation. *Tyraquellus ad l. si unquam* 8. *C. de revoc. donat. verbo donatione largitus num. 48 et 85. Covarruvias 1. variar. resolut. cap. 13. in fine. Responsa Jurisc. Holl. part. 3. vol. 1. consil. 187. et part. 3. vol. 2. consil. 240. num. 11. et seqq. et part. 4. consil. 64. et part. 5. consil. 2. pag. 9. et 11. DD. ad. d. l. 3. ff. h. t. (1. 4).*

20. Privileges are extinguished in various ways; personal privileges by the death of the person to whom given; real privileges by the extinction of the thing conceded, *l. in omnibus* 68. *l. privilegia* 196. *ff. de regul. juris* (Dig. 50. 17). If the privilege be granted to a State, a college, a corporate body, a camp, and these are overthrown or dissolved by hostile violence, or an incursion of robbers, it is not to be thought that the privilege itself thereby perishes; but rather that when the college is restored, and the State or camp re-established, the same peculiar law ought to be considered as remaining as it formerly was: for it would be very unjust that to those already sufficiently afflicted by fortuitous accident, without their own fault, and who are oppressed by warlike calamity, still another affliction should be added, *arg. l. aede sacra* 73. *ff. de contra. emptione* (Dig. 18. 1), *l. cum. loca* 36. *ff. de religio et sumpt. fun* (Dig. 11. 7). It would be otherwise held if the State had lost boundaries on account of a delict, or the camp were destroyed, or the body of men disassociated; for then their restoration, perhaps brought about by their own connivance, would not cause those privileges to revive which had been once extinguished by law. A new concession would be necessary, for nothing would be more absurd than that benefits, lost in a lawful manner, should be restored to their

former vigor without a new exercise of will by the Princeps from whose indulgence alone they had proceeded. *Andr. Gayl libr. 2. observ. 61. num. 1. 2. 3. et seqq. Zoësius ad Pand. h. t. num. 27. 28.*

21. Whether privileges expire by the revocation of the grantor is not quite clear. I see that a distinction has been made by *Andr. Gayl lib. 2. observ. 60. num. ult.* and *Merula in praxi libr. 1. tit. 4. cap. 3. num. 38*, as to whether the concession has been made to one who is a subject, or one who is not: so that in the former case they think that a revocation is often permitted to the Princeps, but not in the latter. But as subjects are not any more to be defrauded out of their benefits than strangers, and as the Princeps is not less bound to keep faith according to the law of nations, with both, there does not appear to be any such sufficient reason of distinction; whether it be that the privileges in question arise from the mere favour of the Princeps or whether they arise from some antecedent contract. They are of the more correct opinion who give to the Princeps the power of revocation in those privileges which flow from his mere liberality, without any precedent or subsequent agreement or obligation, and which he has conceded indefinitely, without any mention of time, or (which is not infrequent) as to which he has reserved to himself specially, at the time of concession, a power of revoking, altering or diminishing. For these privileges can be considered to be had and possessed by the grantees by no other than a precarious right, nor can he be said to do any injury who revokes a precarious right, or uses a right reserved for himself, even if there be no peculiar cause of revocation. *Besoldus delib. juris ad Pandect. libr. 1. num. 13. Hugo Grotius Manuduct. ad Jurisprud. Holl. libr. 1. cap. 2. num. 24. Matthæus de auction. libr. 2. cap. 7. n. 51.* A prudent Princeps, however, will feel it incumbent on him not to take away too easily and rashly in the evening what he had graciously that morning bestowed, lest he incur the disgrace of a shameful vacillation and inconstancy of word and deed: whence in a doubtful case it will not be presumed that he revoked the privilege, or wished to revoke it, according to *Menochius libr. num. 6. præsumpt. 40.* But if on the ground of a contract, or an intervening onerous cause, such as anything done or to be done, or a gift present or future, a concession has been admittedly granted, or on account of such desserts and services rendered as often are of as much value as money, *arg. § 2. Instit. de societate (Inst. 32. 5)*, the Princeps cannot lawfully arrogate to himself, out of the plenitude of his power and majesty, the right of revoking, changing, or diminishing such concessions: unless just, lawful, and sufficiently weighty and newly emerging causes of retraction arise which are to be given effect to in subsequent cases. *Besoldus in delibatis juris ad Pandect. lib. 1. num. 13. Zoësius ad Pandect. h. t. num. 30.* The same must be said concerning those privileges which were granted by agreement, or for lighter services, or by the mere benevolence of the Princeps, but were strengthened by an oath, as it were, as fundamental laws taken over by a Princeps on succeeding to the rule, for he solemnly binds himself to the observance of all privileges. As this was elsewhere done, so it has been also the practice during the reign of the Counts in these regions, for the people, or the Count representing the people, does not swear to respect the words of the Count, before he himself has sworn to do the same by the people, and thus bound himself to conserve and defend the privileges. *Besoldus d. libr. 1. num. 13. Hugo Grotius d. libr. 1. cap. 2. num. 22. et seqq. Consult. Jeconsult. Holland part. 5. consil. 2. pag. 18.*

19. 20. Whence proceeded the solemn promise of Philip of Burgundy Count of Holland, not to grant any mandates or rescripts to the prejudice of privileges which had been granted to the towns or cities of Holland, 11 June, 1452. vol. 2. *placitorum* p. 658. This was repeated by the privilege of Mary of Burgundy, 14. Martii, 1476, d. vol. 2. pag. 658. et seqq. And although the Kings of Spain, as Principes of Belgia, in many corrupt cases thought the opposite in the administration of civil justice, and more especially of criminal justice, yet what they found granted as privileges to States and others, although affecting the very right and power of their majesty, they specially decreed should be left intact. *Ordinance of Criminal Justice of King Philip*, 5 Julii, 1570, art. 15. 20. 79. and elsewhere, 1. vol. 2. *placitorum* pag. 1007. But if privileges for a certain number of years, or in perpetuity, have been so obtained that they were manifestly got from the grantor by the suppression of truth or the suggestion of falsehood, it is without doubt that such false petitioners may be as quickly deprived by the Princes of the effect of what they have obtained, as is shown by what I have already laid down concerning rescripts which labour under such defect (ante). It is approved as a just cause of ademption if artificers, workmen, and the like abuse the privilege conceded to them, contrary to the intention of the Princes in granting it, and in fraud of other subjects: as was unanimously decided according to *Jacobus Coren observat.* 27. num. 157. *usque ad finem. Zoerius ad Pand. h. t. num.* 29. Also if under allegation of a privilege they declare the law for themselves, contending for the privilege more by deeds of violence and arms than the recognition of a competent Judge and asking his aid. *Placitum Car.* 5., 1 April, 1521, vol. 2. *placitorum* pag. 2056. This is very true if the whole body of artificers has thus abused the privilege, for if it was extended to the whole body and the offence comes from individual members who do public or private harm without the assent of the whole body, but under cover of its privilege, it would be unjust that, from the act perhaps of a few, other innocent persons, and the whole body, should be defrauded out of an acquired right. For the punishment ought to be where the blame lies, sins ought to bind their own authors and each one ought to be subjected to punishment for his own act, not made the successor of another's crime: besides punishment should not go further than where the delict is found, *l. sancimus* 22. *C. de pœnis*. (C. 9. 47), *l. crimen* 26. *ff. de pœnis* (Dig. 48. 19), *arg. cap. si diligenti* 12. *in fine extra. de foro competente.* *Andr. Gayl libr. 2. observ.* 60. num. 14.

22. It is manifest further that a privilege is extinguished by renunciation, for everyone can rightly renounce a right and favour introduced for himself, *l. pen C. de pactis*. (C. 2. 3), whether this is expressly done, or whether the wish to renounce is openly declared by deeds and acts as when, where a privilege consists in not doing a particular thing, an act is done totally and directly contrary, *arg. l. semper* 5. § *ult. ff. de jure immunit.* (Dig. 50. 6), *joined to l. Severus* 9. § 1. *ff. de decurion.* (Dig. 50. 2), as if one who is elected to any body or college which has an immunity, voluntarily allows himself to be entered in another such an order, whereby he at once ceases to be reckoned among the members of the former college and begins to be subject to the duties, *d. ll. et l. 1. 2. C. de his qui sponte mun. pub. subeunt.* (C. 10. 43), *Hieron. Schurppius cent. 1. consil.* 14. num. 2. *Gayl libr. 2. observ.* 60. num. 10: provided the act has taken effect, not

if it is merely tentative. *Praeses Everhardus consil. 21. paulo post medium. Menochius libr. 6. praesumpt. 41. num. 12.* That renunciation, however, which is gathered from acts and deeds ought to have the strictest interpretation; for a renunciation of one's right involves in itself a kind of donation, and no one, where there is a doubt, is presumed to donate, or to throw his right away. The consequence is that anyone willingly doing that, in a particular case, which he could have declined to do by virtue of a privilege, and thus doing but one single act which deviates, it is true, from the privilege, but is not directly and wholly contrary to it, is not deprived of his privilege in other cases afterwards arising. For if anyone has obtained an immunity from taxes and other impositions, or freedom from personal service, and once willingly pays the tax or does the duty, it would indeed be hard that the presumption should be thence drawn that he desired that the benefit of his immunity and excuse should be lost to him for ever. The duties of a voluntary guardianship do certainly not derogate from privileges; this is laid down *l. voluntariae 12. C. de excusat. tut. (C. 5. 62)*, nor is a competent privilege lost if anyone having freedom from public duty willingly takes upon himself any office of honor, and slightly relaxes his public right in order temporarily to serve the necessities of his own country and his own glory, *l. qui publici 2. Cod. de his qui sponte publica munera subeunt. (C. 10. 43.) Menochius libr. 6. praesumpt. 41. num. 1. et seqq. Andr. Gayl libr. 2. observat. 60. num. 10. 11. 12.*

23. But if privileges have been given, not to individual persons, but to a whole body of persons, no part of that right is lost to the whole body through the renunciations of individuals, nor is the privilege overthrown by any individual acts contrary thereto; for no one can alienate the right of another, and it would be another's right as opposed to the right of the individual, for the right here is the acquired right of the whole body, *arg. l. sicut 7. § si quid 1. ff. quod cujusque universi. nomine (Dig. 3. 4)*. It would be especially unfair if the acts of individuals, and especially of a few, could injure all the members of their college or State or of another society, *arg. cap. si diligenti 12. in fine extra. de foro competent. Andr. Gayl lib. 2. obs. 60. num. 13. 14. Menochius d. libr. 6. praesumpt. 41. num. 5. Praeses Everhardus consil. 21. prope finem.* I need not say that it is not infrequent that where a privilege is given to a public body, not even its members can renounce it so as to take away the power of using the privilege for themselves and themselves only. For which reason, although on the principles of the Roman law, it was free to anyone to renounce the prescription of *forum* with which he was armed on account of military rank or the prerogative of dignity or priesthood, *l. pen. C. de pactis (C. 2. 3)* by the rescripts of the Pontiffs, it was decreed on the contrary, that no clergyman should agree by any pact to submit himself to the secular Courts the reason being added that it was not a personal benefit but rather a privilege granted to the whole ecclesiastical college, one which could not be derogated from by the pacts of private persons, *d. c. diligenti 12 in fine extra de foro compet.* And, generally, whenever privileges have a "null and void" clause (as they say) annulling all acts done to the contrary, I find it generally laid down by the commentators that such privileges are neither lost by renunciation, nor by any act done contrary thereto. *Andr. Gayl d. libro 2. observat. 60. num. 12. Hieron. Schurpf. cent. 1. consil. 14. num. 3. Menochius libr. 6. praesumpt. 41. num. 10.*

24. It is doubtful whether privileges perish by prescription. If they consist in doing a thing, and in the exercise of any act, and if during the whole time which the laws or customs of any State have fixed as the time of prescription, no opportunity for their exercise has arisen, the privileged person cannot be met with a plea of prescription. As prescription cannot run as against one who is not able to act, so no blame or negligence can attach to those who, as much as they might have wished it, were without suitable objects for the use of such privilege, and this is the chief reason for admitting prescription, *arg. l. et Atilicinus 35. ff. de servit praed. rust.* (Dig. 8. 3). And as it seemed inequitable that a right of road for the purpose of burial should be prescribed because it had been too long disused, inasmuch perhaps as no one had died who could be carried there, *l. iter 4. ff. quemadm. servit. amit.* (Dig. 8. 6), so it would be equally absurd that anyone should be deprived of the rights of jurisdiction or sole rule (which is now reckoned among privileges) because perhaps in the course of a whole century, or a longer time, no one had been apprehended for punishment or for bodily torture. The same principle must hold good in similar cases. *Dion Gothofred. in not. ad. d. l. 4. Andr. Gayl libr. 2. observ. 60. num. 2. 3. Carpovius definit. forens. part 2. constit. 3. defin. 23. Ant. Faber Cod. libr. 7. tit. 13. def. 10.* But certainly, if the opportunity of exercising the privilege had not been wanting, and the grantee had not used it from that time onwards through the whole period fixed by law or custom for the period of prescription, it is undoubted that it would perish by prescription. And thus by not using the right of market days obtained from the Princeps, for the space of 10 years, he who had the right lost it, as *Modestinus teaches l. 1. ff. de nundinis* (Dig. 50. 11). *Menochius libr. 6. praesumpt. 41. num. 16. Andr. Gayl d. libr. 2. observ. 60. num. 1. 2. Carpovius d. defin. 23. Hieron Schurpf. part 1. consil 14. num. 1. 2.* If the privilege consist in any kind of monopoly, as if only those thus donated shall exercise this or that kind of workmanship, as for instance that it shall be allowed to them only to brew beer within the fortified towns and not in the country, to exercise the calling of shipwrights, &c., as we find was conceded to certain States of Holland by Charles V. 11 October, 1531, vol. 1. *placitorum pag. 1268 et 18 Januari, 1549. vol. 2. pag. 2060*, prescription applies to such privileges also, in so far at least that when they have exercised this trade in the country for the time necessary for prescription, the State not interposing nor creating any impediments, then they are clothed with this particular right, and cannot afterwards be compelled by the authority of the courts to discontinue this trade; the States retaining their privilege and their right to interfere as far as it concerned all others who wish to establish new establishments in the country, and to carry on such trade, or with those who have already exercised such right, but not yet continued it for the period of prescription; the axiom of law thus prevailing that so much is prescribed, or its prescription interrupted, as is possessed and no more, *arg. l. 1. § si quis hoc. et § 5. ff. de itin. actuque privat* (Dig. 43. 19), *l. fundum 7 § 1. ff. pro emtore* (Dig. 41. 4), *l. quod meo 18. § ult. ff. de acquir. vel amit. possess.* (Dig. 41. 2), *l. rerum mixtura 30. § ult. ff. de usurp. et usucap.* (Dig. 41. 3). *Consult. Jctorum Holland. part 3. vol. 1. consil 168. Ant. Matthaeus de auction. libr. 2. cap. 7. num. 84. 85.*

25. A privilege is not extinguished by the death of the Princeps who conceded it, whether it be real or personal, whether it be given

absolutely or so that it is revocable at the will of the grantor. For although this revocability at will of the grantor depends wholly on the wish of the Princeps, and although it commonly obtains that what depends on the free will and power of anyone ceases with his death since human wish does not extend beyond the end of life, *l. locatio* 4. *ff. locati* (Dig. 19. 2), and although a gratuitous concession given at the pleasure of the grantor is said to expire with his death, as if his pleasure then ceases, *cap. si gratiose* 5 *de rescriptis* in 6, it must yet be borne in mind that the Princeps as such never is civilly wanting, never dies, but remains in his successors. Whence since by the natural death of him who is Princeps, or fills any other office, those things are not extinguished which were left to the Princeps as such, or to another filling a position of dignity (although they were in other respects of such a nature that they would be extinguished by death), but are transmitted to his successors in office, as if they were not given to the person, but to the office of Princeps or the other dignity itself, *l. quod Principis* 56. *ff. de legatis* (Dig. 30. 1), 2. *l. annua* 20. § 1. *ff. de annuis legatis* (Dig. 33. 1), thence it is proper by similitude of reason that, the Princeps being exempt from human things, if endowed with majesty and as Princeps he had given benefits to be revoked at pleasure, they do not die with him; but following the transmissible nature of such grantor himself, his successor in rule has at all times the power of revoking them. Nor should the words which occur in *d. l. 4 ff. locati* and in *d. cap. si gratiose* be taken in any other sense than it is at the discretion of the successor, whenever he wishes, to revoke as quickly as he likes concessions made in this way, just as if they had been taken away by the death of the grantor. This interpretation is very greatly assisted by the conjunction of the word *precarii* with *locatione* in *d. l. 4*, for otherwise it is agreed that the concession of a thing held at will of grantor (*precarium*) is *ipso jure* terminated at the death of the receiver, but not by the death of the grantor; it rather passes to the heir of the grantor, and what any one asked at the will of Titius, that also it seems he could ask *precario* from the heir of Titius *l. quaesitum est* 8 § *quod a Titio* 1. *l. cum precario* 12. § 1. *ff. de precario* (Dig. 43. 26). *Andr. Gayl libr. 2. obs. 60. num. 15. 16.*

26. When anyone armed with a privilege (whether he be a private person, or a college, a municipality, or a State) is disturbed and impeded in its exercise, it is not meet that he should contend for his right with a violence of deeds or with arms, even if one State suffers a violation of its privileges at the hands of another State: especially if the impediments arise, not in the territory of the privileged State itself, but elsewhere. But it is not prudent even in our own country to seek a remedy by the law of retaliation, or by reprisals, as it is called: lest occasion be thus given for a greater tumult and the beginning of a civil war *arg. l. non. est singulis* 176. *ff. de Regul. jur.* (50. 17) *placitum Caroli* 5. 1. *Aprilis* 1521. vol. 2 *placitorum* pag. 2056. We should rather try to protect our rights by a suit before a judge, for he is the competent judge of both injury and injured: and that by possessory remedies; or if the privileges of one State (of Holland) are infringed upon by the decree of another State, then by appeal to a higher tribunal. For, although it belongs more to politics than to law to lay down municipal decrees and statutes, for which reason the discussion of matters of this sort might seem to be beyond the power of the tribunals: yet you will

deservedly call the discussion more a juridical than a political one, when the controversy is whether by such a municipal law or decree or even act, the right of another, acquired by privilege, is taken away. *Consult. Jctorum Holl. part 3. vol. 1. consil. 186 et part 4. consil. 145, 146, quas repetita part 5. consil. 217.* More than once within my memory, and with a happy issue, have, in defence of the rights of our State and the protection of its privileges, mandates been obtained from the Supreme Court, for the purpose of conserving possession, against those who endeavoured to disturb our rights.

TITLE IV.—PART 2.

ON STATUTES.

SUMMARY.

1. Belgium, even federated Belgium, differs in its laws and institutions ; in all save its language. Therefore very difficult questions arise as to the authority and individual force of statutes, laws, and customs of provinces and municipalities in the conflict of this diversity. These may be answered by three inquiries—
 - a. How far can a people extend and protect its own laws and exclude other laws from within its own limits.
 - b. In how far the comity of nations liberally allows the extension of statutes and decrees beyond the territory of the lawgiver, no law binding him thereto, and how far treaties have been made between neighbouring States to preserve this comity.
 - c. In how far a citizen or foreigner can recede from the provisions of the municipal or provincial law, whether by express agreement or tacit pact presumed from circumstances. Into this discussion as to the interpretation of statutes will not only enter the laws made by inferior magistrates but also by the Princes or populus, whether express or sanctioned by custom : of the Germans, Anglians, Gauls, Hollanders, and Ultrajectini, therefore all the laws of all nations save the civil and canon law. Also the personal decrees of judges as to individual rights, declaration of prodigals, infamous persons, grant of *venia ætatis*, &c.
2. The leading distinction of persons is into real, personal and mixed. The result of much discussion as to these is that personal statutes are those relating to the general status of men, their capacity or incapacity, whether mention be made of a *res* or not, provided the intention be to legislate not as to the thing but, with a few exceptions, as to the person : thus, whether a citizen or a stranger, noble or ignoble, infamous or not : whether by age and position he can testate ; whether a woman or minor can contract without husband's consent or tutor's authority : declaration of a prodigal : grant of *venia ætatis* : interdiction from, or admission to, ranks of advocate, court, business or trade, be a notary and the like.
3. Real statutes refer chiefly to things and disputes concerning them, whether there be mention of person or not, as long as the primary intention of legislator was as regards things and not persons : e.g., right and order of intestate succession : admission or prohibition of donations among spouses : limitation of marriage community : testamentary disposition admitted in some places, forbidden in others.

4. Mixed statutes treat neither of persons nor things, but acts by persons concerning things, judicial or extrajudicial, and their form, mode and solemnities. This threefold division Paul Voet has adopted, and Grotius and Vinnius.
5. On first principles neither real, personal, nor mixed statutes have *per se* force beyond the territory of the legislator, nor in foreign States without the consent of their legislatures; remembering, however, that a subject may be so either with respect to goods—having goods within a territory, though he is domiciled elsewhere; or in respect of persons—having a domicile here, although the greatest part of his goods is situated elsewhere, or being a temporary subject while remaining in, or passing through a country.
6. There being no difference as to real statutes, they are not further discussed.
7. Some think that personal statutes have operation beyond the territory of the legislator: that if at the place of domicile he has, or has not, a certain capacity he is considered so everywhere: that when the right and capacity of persons to do civil acts is in question, it is decided by the law of the domicile, which thus obtains everywhere, whether the statute of the domicile applies to individuals or to a particular class: that hence one who is a minor or major at his domicile is everywhere regarded so, even where a greater or a lesser age makes a major: that one declared infamous, or prodigal, noble, or legitimate at his domicile, is so wherever he goes, without change. But in answer to this principle that personal statutes bind elsewhere, the author proceeds to show that this is a wrong principle, and that personal statutes cannot egrede the country of the legislator any more than real statutes; for both real and personal statutes derive their existence from the legislator, who is however limited by his jurisdiction and has no authority extending without its limits. Nor has the legislator power to enforce obedience, beyond his limits, to his declaration that a person has capacity to do acts or not to do them. The usual plan is to obtain letters requisitorial, by which the magistrate abroad is asked, as a favor, to allow execution of immovable property: which letters are sometimes refused. Several arguments are given in proof of the non-recognition elsewhere of statutes of domicile.
8. That the contrary was the case with Rome and her provinces, the author shows not to be inconsistent, for they were all under one Princeps, who appointed the different magistrates, and thus allowed a tutor appointed at Rome to have administration everywhere, and a sentence passed there to be executed elsewhere. With us it is different. There are many diverse regions, laws, constitutions, without a common head or supreme ruler who would command uniformity of action among magistrates. The author proceeds elaborately to controvert the opinion of certain jurists who hold that personal statutes should have effect everywhere.
9. Still the statutes of the domicile accompany one journeying in or passing through another country, as far as the goods of the domicile are concerned, but not further. Thus if one, declared a prodigal in Holland, went into Ultrajectina or Vriesland (where he would, on the principles already laid down certainly not be regarded as such), and contracted there and returned to Holland, he could not there be sued on such contract. Or if a filius familias testate in Vriesland (where the power to do so is denied him) his testament would hold good in Holland as to the goods situated there. The judge of the domicile is not prevented from making a rule forbidding his subject by domicile to do anything in regard to immovables, situated elsewhere or to do any act there, under a penalty executable on his return, or even during his absence, on the

goods at the domicile, if the penalty were a fine. States may justly and reasonably therefore prevent citizens suing each other beyond the domicile, &c., on pain of punishment.

10. The same principles apply to mixed statutes. Therefore one magistrate is bound to ratify, in regard to goods situated in his jurisdiction, dispositions made elsewhere, according to the law of such other place, and not observing there the law of the place of situation. Thus in Frisia seven witnesses are required for a will, in Holland two with a notary. If a Frisian, then, or a Hollander, testate in Frisia concerning Frisian goods, before a Frisian notary and two witnesses, undoubtedly the disposition would be null. Nor would a Frisian judge accord force to it even if the three parties were known to be of the most authority and faith. Or if, in the converse case, a Hollander or Frisian testated according to Frisian goods in Holland, before a notary and two witnesses, and therefore without proper solemnity, the Frisian judge would not recognize such a disposition, for the most unimpeachable in his own country could not so testate. If a magistrate have power wholly to forbid testamentary dispositions concerning things in his territory, why not, still more, pass a law not to allow any other dispositions concerning things in his territory when not made according to his solemnities. Illustrious authors have held that acts done by minors, without full solemnities according to the place of the act, are inoperative as to goods in countries where greater solemnities are needed.
11. Therefore it is established, I think, that all real, personal, mixed statutes (or whatever other division be adopted) lose their effect, entirely, beyond the territory in which passed, and that a judge of another country is not bound, in regard to things situated in his country, necessarily to follow laws not his own. More especially if they relate to succession, powers of testating, or contracts, in regard to which movables follow the law of the domicile and not the situation. For the judge of the domicile would have no jurisdiction over things dispersed over distant regions. By a fiction of law, therefore, it was considered that the testator intended to consider the movables (which are unbound to place), as at the domicile when he testated, and if the judge of the domicile do lay anything down as to goods situated elsewhere, it is taken to be as if he considered they were at the domicile. The laws of different places differ as to what are movables and what immovables; some are movables here and immovables there. Large trees adhering to the soil are everywhere considered immovables except in Flanders, where they are movables. What are regarded as movables by the law of the domicile, immovables by the law of the situation, are ruled by the law of the situation; the magistrate not being even allowed in comity to hold that, as movables, they follow the domicile.
12. But on principles of comity mutuality of statutes is given and taken, and magistrates depart from the rigor of the law thus stated. As to immovables magistrates cannot depart from the principles laid down but must strictly adhere to the law and regard immovables by the law of their situation. But as to testation in regard to movables, when the question arises whether that shall be allowed or intestate succession admitted: donation permitted or forbidden between husband and wife, &c., by common consent of all nations, there is a relaxation of the strict law, and it is a general rule of comity everywhere adopted in practice, that in cases of doubt, movables are regulated by the law of the owner's domicile wherever they may really be situated.
13. And so as to mixed statutes, respecting the solemnities of acts done, the observance of the solemnities of the place of the act is sufficient; so that what is there properly done extends to movables and

immovables situated elsewhere, where very different solemnities are needed.

14. Unless anyone went abroad in order to avoid the more difficult and expensive solemnities of his domicile, without necessity, and in fraud of the statute, and then return. For then it cannot be expected that the foreign acts thus solemnized should regulate the goods at the domicile or the validity of a will, since he who deliberately and fraudulently spurns and circumvents the law of the domicile is unworthy of any benefit or comity. Thus one who, knowing that the taxes to be paid to the fisc on sealed charter were higher, went abroad to defraud the stamp law to another place where there were no stamps, and having had the deed executed returns to his domicile. Or where the statute expressly forbids that an act shall be done beyond the jurisdiction and without other solemnities.
15. How if one anywhere does an act without observing the local solemnities, but observes the solemnities of the place of domicile or situation which are different or less. Some authorities pronounce such acts of no effect; but without just reason. For, as has been shown *ante* one is a subject by reason of domicile or of immovables, and every magistrate defends his power as far as he can. It would be unjust to a subject in either of these ways if the magistrate do not hold good his will or contract in respect of goods in the magistrate's territory, in as far as he sees that the statutes of his country have been observed in regard to solemnities, especially as, thus defending the force of his own statute, he does not thus overthrow what is elsewhere done and cannot be said to do injury to the laws of neighbouring magistracies. Take the case of an Ultrajectine having his domicile there, possessing immovables in Holland, dying in Frisia, having there made a will before a notary and two witnesses, and with the necessary solemnities required in Holland and Ultrajectina, the authorities of Holland would fairly and equitably sustain such a disposition in regard to Holland immovables, and the Ultrajectini as to immovables there situated, but in regard to movables situated anywhere, would rule as if they were by fiction situated in the law of the domicile. For in disputes concerning them he finds the prescribed laws followed, just as the prætors upheld wills which though invalid according to the strict civil law, had the solemnities required by him. It is just that he should not be thought worthy of the benefit of a statute who did not observe its solemnities, but acted contrary; but on the contrary the advantage of the statute cannot be refused to him who has observed it, in regard to the goods in the territory of the State. Some authors admit this only in regard to statutes favourable to the domicile but deny it beyond. But Voet differs from them; and thinks it should be a general rule.
16. The author here proceeds to discuss in how far personal statutes have effect beyond the territory of the legislator by a certain comity in regard to things situated in another territory. But in the absence of certain rules of definition or generally approved principles received by the mutual tacit consent of nations he prefers to treat of each subject under its own head. Whether one could testate in the place of the domicile, can testate over things situated elsewhere where the law declares him incapacitated, and, whether one emancipated or declared a prodigal in the place of his domicile, is thus to be regarded everywhere in regard to immovables, everywhere situated, etc.
17. Lest the exchanges of comity should be vague and uncertain and often not mutual, and lest one country should deny to another what it had itself previously obtained, special conventions were often made, or inveterate customs having force of conventions, defining what each country was to do. Thus customs have laid it down in many places that judgments elsewhere obtained were allowed

execution on the goods in another country, when the judge was prayed thereto as to the goods within his jurisdiction. It has also been agreed between countries that a curator appointed at the domicile to one who was dead there or surrendered, and the like, should have right and authority for goods situated in another territory, although, at the place of the domicile, the lesser part of the goods and number of creditors was to be found, and further that the settlement as to the order of creditors should be made where the curator was appointed.

18. In how far is it allowed to private persons to depart by pact and contract, from the law? A distinction must be made between public acts, including forms and solemnities of proceeding, and private acts for the benefit of private persons. As public law cannot be changed by pact, and the rights of the State are not matter of commerce, the consequence is that a private person cannot validly contract in matters not concerning his own private estate but concerning public things and public loss. With regard to statute provisions having reference only to private rights and utility, it should be noted if they are prohibitory or simply disposing what was to be done in particular cases. Prohibitory statutes are those which nominately forbid anything to be done, e.g., that no one marrying a second time can leave more to his spouse than the least portion to the children of the first marriage: that there shall be no community where the marriage was entered into with antenuptial contract: that spouses should not donate each other nor favour each other by testament: that wills should not be as to immovables. Those are not prohibitory which are merely negatively laid down: that marriage does not bring community between spouses, or a spouse does not succeed to a deceased spouse. Whatever is done contrary to such prohibitory law is void as regards property situated in the prohibited country, whether by those domiciled there or residing elsewhere, where no such law. Thus a Hollander, e.g., would in vain bequeath his movable property in Ultrajectine to his wife, or testate as to movables, where testating them was forbidden. More fully discussed in their proper places. If the law as to private persons is not prohibitory but merely disposing, without doubt such laws can be receded from by private pact or contract. Where States prescribe the succession *ab intestato*, a testator can depart from the order of succession. Community of goods is in many places allowable but can be wholly or partly departed from by dotal pact. So where only the community of profit is without further prohibition enacted, the common gain can be extended by pact to all the goods of the marriage. Therefore the Frisian can validly contract by antenuptial contract for a universal communion as to a particular thing existed in Frisia, although the Frisian law only allowed a particular community in marriage. Nor on the contrary can Hollanders be prohibited from renouncing the Statute Law of Holland which provides for a general communion, if satisfied with a particular community of gain.
19. The recession may be express or tacit. As one is supposed to know or easily to learn the law of his domicile, but not of other lands where probably, being rich, his goods are dispersed, the presumption is, where doubtful, that a person has, in contracting as to his own things, gone according to the law of the domicile, for if he had wished otherwise he could have distinctly so contracted. The universal community of goods in force in marriage at the place of the domicile extends to all goods even in places where such community is unknown, but not to those places where only a partial community of acquets is in vogue.
20. But these tacit and presumed pacts do not extend to goods situated where there is a prohibitory statute, for the force of a statute can-

not be taken away by express pact as before described. Nor is one supposed to have further adhered to the law of the domicile than the law of the domicile allows a citizen to recede by pact from the statute laws. For the law of the domicile may be peremptory and not allow a rescission from the law as it stands.

21. This presumption, so to follow the law of the domicile, ceases where there is no disposition at all. Therefore where one dies intestate, Here are, as it were, sets of heirs one for each place where property is situated. Ordinary tes.

1. What Julius Cæsar anciently said of the Gauls, *libr. 1. de bello Gallico in pr.*, viz., "that they were diverse in language, in institutions, and in laws," is also very true of the whole of Belgium, and, if you except language, true also of the federated provinces. Whence there frequently arise the most intricate and almost inexplicable controversies as to the authority and force of statutes, laws, and customs, as well provincial as municipal: how far each puts forth its own power, where it is evident that diverse and often contrary statutes, &c., were made in different countries on the same subject. Therefore I have thought it would be worth the labour if I should go a little deeper and compendiously treat this subject according to the principles themselves, of law and natural reason. I hope I shall accomplish this in three divisions. In the first I shall lay down what ought to obtain according to the very letter of the law (*ex summo jure*), whenever a people is tenacious of its own laws and intends to extend them as far as possible, to defend them, and to exclude other laws from its own country. Secondly, what, on principles of comity, one nation liberally and courteously concedes, permits, allows to another nation, each to the other, in regard to the extension of statutes and decrees beyond the territory of the nation making such statute; not being otherwise bound so to do by any law: and how, that equal bounds of comity may be observed on both sides, it has been defined and established in some matters by different public agreements between cognate and adjoining nations. Then, thirdly and lastly, how far everyone, whether a citizen or a stranger, can recede from the dispositions of municipal and provincial laws by can express agreements, or is considered so to have receded by tacit pacts deduced from presumptions. It will suffice to have once given the warning, beforehand, that in these discussions concerning the variance of statutes, not only do the laws of the inferior magistrates come under the appellation of statutes, but also those of the highest Princeps, clothed with the majesty of the people, whether sanctioned by express wish, or introduced by the manners and customs of those using them, such as the Germans, the Anglians, the Gauls, the Hollanders, the Ultrajectini, and other like nations: therefore all the laws of all the nations, (the Roman civil law and the Canon law alone excepted): the sentences and decrees of judges and magistrates concerning individual persons; how prodigals and infamous persons are so declared; how the *venia ætatis* (privilege of age) is obtained, &c.

2. The leading division of statutes is into personal, real, and mixed. How much the commentators differ in regard to their descriptions and limits of these three species, I shall not tell at length. It will be sufficient to note that the more frequent agreement of the chief and skilled commentators on statutory law, as regards personal and real statutes, amounts to this (if you except a few cases as to which there

is a difference of opinion), that personal statutes are those in which the provisions principally concern the universal or quasi-universal condition, quality, capacity, or incapacity of persons, whether there be no mention made at all of things; or whether such mention be made, but the principal intention of the person making the statute be not to dispose concerning any thing, but concerning a person. Those statutes, for instance, in which it be determined whether anyone is to be regarded as a citizen or a stranger, a noble or a plebeian, infamous or of good fame or restored to fame, whether one is of that age and condition that he can make a will as to his goods, or not: whether a wife or a minor is to be allowed to contract without the consent of husband or tutor; or not. Nor the less do you refer to this heading, the declaration of one as a prodigal; the concession of the benefit of age; the interdicting of advocacy, or of the forum, or of business, or of any art: or, on the other hand, the admission to their exercise, whenever a peculiar admission is necessary, as to the exercise of the art of a drawer up of public instruments or notary, or the like: and, in general, whenever the quality of the person is added to or detracted from, and thereby appears to be either capable or incapable of performing different arts.

3. Real statutes, on the contrary, principally affect a thing, and dispose as to a thing, whether there be mention made of a person, or not: provided the primary intention of the person making the statute be but to dispose concerning things and not concerning persons. To this branch belong the rights of intestate succession: in what order anyone is to be admitted to any goods *ab intestato*, in capita (by the head) or per stirpes (by the stock), or lineally, or by right of primogeniture: in what manner legitimate descendants or illegitimate, agnates or cognates are called to the succession: and many other matters similar to these. Nor will you wrongly refer to this class of statutes the prohibition or allowance of donations between spouses, *novellâ decie. Ultrajectini, anni 1659 art. 1*: the limits of community of goods introduced between them in marriage, *l. hac edictali 6. C. de secundis nuptiis (C. 5. 9)*; testamentary disposition forbidden in some places; succession entirely *ab intestato*, elsewhere permitted. Concerning which *Argentoræus ad consuetudin. Britanni. art. 218. gloss. 6. num. 5. et seqq. Burgundus ad consuetud. Flandriæ tractat. 1. David Mævius ad Jus Lubecens. in prælimin. quæst. 4. num. 26. Rodenburch de jure conjugum in tract. prælimin. de jure quod oritur ex statutorum diversitate tit. 1. cap. 2. Paulus Voet de statutis sect. 4. cap. 2. num. 1. 2. 3. 4. et cap. 3. per tot.*

4. Mixed statutes you will not unreasonably term those which neither treat, principally, of persons nor of things, but define the form, the manner, the order, or the solemnities of acts done by persons concerning things, whether judicially or extrajudicially. In which sense my memorable father, Paulus Voet, received the words "mixed statutes:" *de statutis d. sect. 4. cap. 2. num. 4. in med.* Nor did it displease Hugo de Groot to picture in this way a triple division of statutes, when often busying himself to deduce and illustrate the laws from the principles of the natural law themselves: for in his "advice" (consilium) which is found among the *consult. Jectorum Holland. part. 3. vol. 2. consil. 341. revera 241. num. 1. 2. 3. 4. 5.* he says it may be observed from Baldus that all law is imposed on person, thing, or action: on person, in the inquiry whether capable or incapable, or *vice versa*: on things, since the law directly imprints its effect on things; that the third kind of law is

that which gives form to an act, and in regard to that, the place where the act itself is done, must be looked to. *Vinnius*, also, *libr. 2. select. quæst. cap. 19.* places such statutes in, as it were, a middle position, not being properly real nor personal.

5. With regard to the force and efficacy of statutes on the principles of the strict law and of natural reason, it is necessary that we admit the rule which the Jurisconsult Paulus lays down in *l. ult. ff. de jurisdictione* (Dig. 2. 1), viz., that "beyond the territory you may with impunity disobey one laying down the law," and "that to an equal there is no rule over an equal, or power of forcing him," *l. nam magistratus 4. ff. de recept. qui arbitr. receptor.* (Dig. 4. 8), *l. ille a quo 13 § tempestivum 4. ff. ad Sconsult. Trebell* (Dig. 36. 1). The consequence of which is that neither real, nor personal, nor mixed statutes can have any operation of themselves beyond the territory of the statutor, nor have any effect elsewhere, without the consent of the legislator there. For, as statutes cannot have any more force than they receive from the legislator making them, and as the power of the legislator is confined to the limits of his territory, it is clearly evident that all the force of his statutes is contained within, and circumscribed by, his territory. Only let us remember this, that anyone is said to be a subject, either in respect of his goods, when he has any goods situated in any territory, although he has his domicile fixed elsewhere: or in respect of his person, when he has his domicile in any place, although the greatest part of his patrimony may be found situated elsewhere, or when he is staying in the territory only for a time, or is passing through it as a traveller, whence they well call such an one a temporary subject. *Responsa Ictor. Holl. part 2. cons. 1. verus. noctans desen.*

6. As in regard to real statutes, most of the commentators agree it is superfluous to say much concerning them. The references are: *Ant. Matthæus de criminib. libr. 48. tit. 20. cap. 4. num. 17. Rodenburch de jure conjugum d. tract. prælimin. de statutis divers tit. 1. cap. 3. in pr. Argentæus ad consuet. Britann. art. 218. gloss 6. num. 9. 10. Abr. à Wesel ad novell. constit. Ultraj. art. 10. num. 138.*

7. As to personal statutes, the opinion of very many commentators is that these reach beyond the territory of the statutor, so that whatever quality or capacity one may possess, or be deprived of, in the place of his domicile, such also is he considered everywhere, according to the personal statute. So whenever the inquiry is as to any person's right or capacity in respect of his civil acts, the power of wholly determining that, is with the judge of his domicile alone; he can so determine respecting the person subject to him by the law of the domicile, that whatever he has published, adjudged, or ordered as to the rights of persons, obtains everywhere wherever such person betakes himself, whether the personal statutes were passed for a certain class of men, or for any single person. Hence one who is a minor or a major according to the law of the domicile, is to be considered so all over the world, even in those places where a riper age, or lesser years, are needed for majority. Hence one who is infamous, or declared a prodigal, a noble, or legitimate, by the magistrate of his domicile, is considered to be so everywhere, nor can he, by any change of place either throw off the quality he has, nor put on another. *Argentæus ad consuet. Britann. art. 218. gloss. 6. num. 4. 12. 13. Hugo Grotius inter consult. Ictorum Holland. part. 3. vol. 2. consil. 341. revera 241. num. 2. 3. Jacobus Marchisellus Sylva, quæstion quæst. 45. num. 2. 3. Christinæus vol. 2. decis. 3. num. 3 et seqq. Christian. Rodenburch de*

jure conjugum in tract. præliminari. de statut. diversis. tit. 1. cap. 3. num. 4. et tit. 2. cap. 1. Abraham à Wesel ad novell. constit. Ultraject. art. 13. num. 23. et seqq. Since these opinions do not rest on any sufficient reason, neither can you find any support for them in the Roman law; it is more true that personal statutes cannot, any more than real statutes, go beyond the territory of the statutor, whether directly, or by consequence. For whatever is adduced to show that real statutes have no operation beyond their territory, you may with the same right apply to personal statutes. It is certain that real as well as personal statutes receive their force from the power of the statutor, and that the power of the statutor is limited to his territory, no one will with reason deny, both on account of *d. l. ult. ff. de jurisdiction* (Dig. 2. 1), and moreover every magistrate is a private person beyond the limits of the power accorded to him, and of an ended power the jurisdiction is also ended. Just as the magistrate himself, when beyond his territory, is deprived of the quality and power given to him, so that he cannot exercise, while he is elsewhere, any acts jurisdiction conceded by the law or the Princeps, and this even by the Roman law itself, notwithstanding that then all magistrates were under one supreme legislator, *l. præses 3. ff. de officio præsidis* (Dig. 1. 18), *l. ult. ff. de offic. præfect. urbi*. (Dig. 1. 12), *l. 2. l. observare 4. § ult. ff. de offic. procons. et legati* (Dig. 1. 16), thus, also, is there no reason why a greater quality and capacity being given or denied by one statute to a private person, it should extend its force to those places where anything different or contrary is laid down by law as the quality or capacity of persons. If this does not seem to anyone to be a sufficient reason, I would wish him to explain to me the reason on, and the manner in, which one legislator declaring a person to be, in respect of his domicile with him, capable or incapable of any acts, will force by his power an equal legislator in another place to obey alien decrees or statutes, or to consider of force or of no force what the judge of the domicile decreed to be so in respect of a person having his domicile with him: especially if it is admitted (as it must be admitted) that an equal has no power to compel an equal. Let him show, I pray, how when one has been declared a prodigal by a magistrate in Holland, or infamous, or legitimate, or capable, on reaching the age of proberthy, to make a testament, and such an one goes to the Ultrajectine provinces, or has immovable property there; let him show, I say, by what legal way the Ultrajectine magistrate can be bound to acknowledge him as such in regard to his goods situate on Ultrajectine soil, and thus hold the contracts of a Hollander—prodigal to be void: or deny dignities to a Hollander who is infamous: or allow the succession to Ultrajectine goods belonging to a Holland bastard, who is legitimated in Holland, to be given to his nearest of kin as if he were legally born to the estate: or order the will of a young man under 18 years of age to be taken as valid. Nay, to what an extent the magistrate of one place could, of his own right, despise, neglect, spurn, the statutes and decrees of a magistrate holding sway over another territory, is abundantly shown by the “letters requisitorial,” as they call them, passing between adjoining nations, by which the privilege is sought, and, on a similar opportunity offering, is also offered as it were as a privilege, that sentences passed by the requestor should be allowed to be executed on goods situated in the territory of the party requested. Such requests, however, are not everywhere granted: for that the execution of a foreign judgment has been denied the Gelri

abundantly show as by their example. No one will deservedly venture to charge them on that account with injustice, but will rather see that they chose thus to exercise a right competent to them in their own territory for the reason stated. And to add something concerning one declared infamous, who, I would ask, does not know that infamy and exile are pronounced by sentence, in one country, for an act by which persons have studied to be useful to another country or Princes (I inquire not whether justly or unjustly); so that they have thus appeared to be the rather worthy of honour than infamy, and to have deserved a reward rather than the penalty of a soiled reputation. And as it ought to be adjudged unjust that the magistrate of one place should wish by his relegation to another place to prescribe to the magistrate of that other place those whom he should admit as citizens in his State, as *Matthæus de criminibus* says, *libr. 48. tit. 20. cap. 3. num. 6*, so it is equally unjust that by his own sentence he should wish to dictate to the magistrate of another place whom he should, as it were, consider honorable in his own State. Nor does the argument of fiscal utility the less oppose that this should be done in cases of legitimation. For since those legitimated are accustomed in some places to pay to the fisc of the legitimator a certain quantity of money, as if in compensation of that right which the fisc, by reason of its succession, had on the goods of an illegitimate person (as in Holland *instructie voor de Heeren van de Rekeninge van de Domeynen van Holland*, 27 Martii 1593. *art. 97. vol. 3. placit. pag. 732*), what reason or rule of justice, I pray, would dictate that by the act of one legislator, without his giving an equivalent reward or price to its fiscus, he should do damage to the Princes or fiscus of another place, since he would be altogether excluded from the succession to the person legitimated (who is everywhere) thereby regarded (as they rule) as legitimate, as far as the goods situated in such other's territory are concerned, especially in those places where the liberty to testate is altogether denied to such illegitimate persons, or where, at all events, according to the opinion of some, the right of testating is taken away from spurious (or incestuous) persons. This opinion regarding personal statutes is that also of *Andr. Gayl libr. 2. observ. 124. num. 6. 9. 10. 11. Hugo Grotius consult. Holl. part. 3. vol. 2. consil. 185. num. 10. 11. Barry de successione lib. 1. tit. 1. num. 46. post med. Pererius tit. Cod. de testament. num. 24. in med*, many others who all are quite of opinion that no statutes of any sort can have force beyond the territory of the statutor. See these cited by *Peckius de testam. conjugum libr. 4. cap. 28. n. 6. 7.*

8. Nor can any support be derived, by those of an opposite opinion, from the Roman law: viz., that, by it, for example, infamy everywhere accompanied one declared infamous by the sentence of a judge, *arg. l. ex ea causâ 9. ff. de postuland (Dig. 3. 1)*: or that the tutorial character imposed on a tutor by the prætor or the præses extends to the administration of goods wherever situate, *l. propter litem 21. § licet. 2. ff. de excusat. tut. (Dig. 27. 1)*, and many more similar cases which occur in the Roman law. It is not to be wondered at that this should have obtained among Roman magistrates, seeing that they were not all supreme, but subject to one Princes, who ruled over the whole empire, and thus all the provinces together, so that proconsuls and præses had only the highest rule in their own province next to the Princes, *l. et ideo. 8. ff. de offic. procons. et legati (Dig. 1. 16)*: *l. præses. 4. ff. de offic. præsidis (Dig. 1. 18)*, thus he command one magistrate to observe the

decrees of another ; to acknowledge the authority of a tutor given by the prætor at Rome over goods in the provinces : to admit a decree made at Rome concerning a pupillary estate situate in the province : should allow sentences passed elsewhere to be executed with him, *l. à D. Pio 15. § sententiam 1. ff. de re judicat. (Dig. 42. 1) : l. magis. puto. 5. § illud queri. potest. 12. ff. de reb. eorum qui sub tut. vel cur. sunt (Dig. 27. 9), l. argentarium 45. § 1. ff. de judiciis (Dig. 5. 1) : arg. l. properandum 13. § sin autem 3. C. de judiciis (C. 3. 1).* This Roman rule you will not therefore rightly extend to our customs, since with us you have many regions diverse from each other in laws and institutions, not under one common head, or supreme ruler, by whom, what it pleased him to enact for the magistrate of one region, could be ordered and enforced on another, who was ordered and commanded to follow it and hold it good. Besides which, in the absence of such command of the supreme Princeps, the Roman laws following natural equity, religiously observed the rule laid down in *d. l. ult. ff. de jurisdictione (Dig. 2. 1)*, as far as the magistrates of each place were concerned, viz., that anyone laying down the law beyond his jurisdiction was disobeyed with impunity, as appears *l. ex ea causâ 9. ff. de postuland (Dig. 3. 1), l. relegantium 7. § interdicere 10. ff. de interdict. et relega (Dig. 48. 22) : l. jurisperitos 30. § 1. ff. de excusat. tut. (Dig. 27. 1) : l. jus dandi. 3. l. 24. l. pupillo 27. ff. de tut. et curat. dat. ab his. (Dig. 26. 5), l. cum unus 12. § is qui 1. ff. de reb. auctor. jud. possid. (Dig. 42. 5).* But even apart from the authority of the law, the opinion which is in favour of the extension of personal statutes beyond the territory of the statutor, is not supported by just reasoning. I hear it said that : "the very nature of the thing, and necessity itself, have introduced the principle that, when a question arises as to the state and condition of men, the declaration of the law concerning it should be wholly left to only one judge, and he the judge of the domicile :" but what that "nature of the thing" was and what "necessity" sufficiently urged it, I have never yet been able to observe. They argue thus : "because," say they, "it is necessary that the status of men should receive its law from one certain place : for how absurd it would be that in as many places as one, making a journey or a sea voyage, is detained, he should there change his status or condition in as many towns : that at one and the same time he should here be a major, there a minor : that a wife should at the same time be in and out of the power of her husband : that in one place a person should be a prodigal, and in another place a frugal man : and besides that, as a person is not fixed to a certain place, while things of the soil are fixed to a place, and without inconvenience obey its laws : so it is established with the highest forethought, that man should therefore take his status and condition from the place of his domicile : the legislator there being taken to have found out for all what was best for the need of their own country, at what maturity of judgment their subjects were able to act, and to fix which of them needed authority and when, for transacting their own affairs. This from *Argentæus ad consuetud. Britann. art. 218. gloss. 6. num. 12. Christ. Rodenburch de jure conjugum tract. prælimin. de statut. divers. tit. 1. cap. 3. num. 4.* But this is not happily argued, since it is gratuitously assumed, and not at all proved by any sufficiently firm reason, "that it is necessary that the status of men should receive its law from one certain place." But as it is rather true that one may be a subject from different causes, either by reason of domicile, although he have no goods there ; or by reason of goods, although there, where the thing is situated, he has not fixed the seat of his

fortunes, as before said : so it is not absurd, nor unjust, that one and the same person should, in respect of the site of his goods, be either capable or incapable of disposing of them according to the character which the law of each place has given to or denied to such person in respect of the goods there situate : nor would it be unjust that a person not a subject by the reason of domicile, should yet, as regards his goods, follow the jurisdiction of another territory and magistrate. For which reason it pleased the Romans that a tutor should be principally appointed to the person of the ward, and not to the thing or cause. If the goods, which the tutor appointed in the place of the domicile was to administer, were scattered over various provinces, it did not suffice that tutors should be appointed by the governors in respect of their several provinces over the goods situated in the province of each one, and belonging to a ward having his domicile of residence elsewhere. I do not deny that it is troublesome that one should be capable in one place, and in another incapable, to contract, to alienate, to testate, &c., and in respect of some things to be his own master (*sui juris*), and in respect of other things, situated elsewhere, to be regarded as one under another's power (*alieni juris*). It would be very advantageous, I concede freely, if there was not so much variety of law in governing, or if personal condition did not vary so. Then you cannot deny that the magistrate of the domicile can very often judge the best as to the quality, the capacity, and the maturity of a man's judgment for regulating, alienating, &c., his property : and then let us also remember that it may also happen that one who is born and educated in a place where, on account of a more slowly emerging evidence of vigor and capacity of mind, one is only considered a major on completing his 25th year, may migrate elsewhere, having scarcely attained his 20th year, to places where on account of the quicker maturity of intellect the 20th year ends minority : and *vice versâ*. As in these cases I find it laid down by the supporters of the view opposite to my own. *Rodenburch d. tract. preliminari de statut. divers. tit. 2. part. alterâ cap. 1. num. 5. 6*, that the recent arrival is to be regarded capable or incapable according to the law of his new domicile, I should like to be informed in what way the magistrate of the new domicile can better decide as to his capacity or incapacity than the magistrate of his former domicile, for the former is entirely unacquainted with the new citizen at the first moment of his arrival, welcoming thus perhaps as capable or incapable, according to the force of his own law, one whom the magistrates of the former domicile regarded in another light, on account of the slow growth of intellect under which they believed those born in their own country laboured : for although the sky be changed, it is well known that the mind is not also immediately changed. But however this may be (to return from this digression), if we even fully concede what has been above noted, neither are then the advantages so great, nor the opposing difficulties so inconvenient and serious, that the necessity should thereby be placed on an unwilling judge of another territory of approving and extolling the judgment of the judge of the domicile concerning the capacity of his own citizen, and that in respect of the disposition of goods situate beyond the place of the domicile : for there would always be a want of remedies by which the magistrates of the domicile could necessarily bind the judges of the places where the goods were situated, judges clothed with equal rule and authority to themselves, and could force them to ratify or invalidate dispositions

made concerning things according to the law of the domicile but not according to the law prevalent in the place where the thing is situated. Nor can we grudge to such a one, nor can it be regarded as a fault, that he should extend the power of his own laws as far as possible ; for the judge of the domicile can do it in respect of goods situated in his own territory, since he stops all execution of acts in such things as are not done according to the law there in force. If this should seem very hard to anyone, let him reflect that it would be far more hard and unreasonable that laws should be made for an equal by an equal, and that a legislator should be bound in his own country by the alien laws of another magistrate: let him reflect that a law is very often hard indeed, but not therefore necessarily unjust, *arg. l. prospexit* 12. § *ipsa* 1. ff. *qui et a quibus manumissi*. (Dig. 40. 9), *l. ita vulneratus* 51. § *estimatio* 2. ff. *ad leg. Aquil* (Dig. 9. 2). But, further, if the difficulties above advanced are not sufficient to prove what was to be demonstrated, it will more fully appear if we note that these difficulties also arise in real statutes. For if you say that it is bothersome that a man should be capable of testating in one place, and incapable in another, should be his own master in one place and subject to another's power in another place, it is equally disadvantageous that an owner should be able to testate as to some goods, and not be able to testate as to others situate where a testamentary disposition is forbidden by law: that a spouse should be able to donate a spouse as to goods situated in Holland, but should be prohibited from doing so in respect of other Ultrajectine goods. Further, that the succession of one dying intestate should vary so according to difference of situation; since at some places the goods are divided *in capita*, in others *in stirpes*: in some places equally and in others promiscuously: in some places the paternal goods go to the paternal relatives, the maternal to the maternal: in some places those who are more remote are admitted by the law of representation, in others, the law being narrowed within closer limits, they are excluded. And yet no one could be ever so far moved by all these difficulties that it would enter as a dream into his mind that real statutes should on this account be extended beyond their territory, although all acknowledge a uniform law of succession would be most advantageous and cut away the hold for many lawsuits, and although the Dutch Counts spent so much labour, but in vain, in the last century, to secure that at least their own provinces should lay down a similar rule of intestate succession for all their parts. As therefore they thought, on account of these difficulties, that there should be taken to be as many estates as there were scattered goods of the deceased in places using a different law: so we think with equal, nay with greater right, that there should be as many separate persons as there are things situated in different places where the owner is clothed with a differing right and power. For if you conceive of many inheritances, it is necessary that you at the same time conceive many persons, for there can only, naturally, be one estate of one person, only one succession to all his right. And hence, I think, it is that the Counts of the Ultrajectine provinces, restricting the capacity to testate, by their new decision, to 18 years in males and 16 years in females, and not finding any way by which they could effectually extend the new law to the immovable property of Ultrajectines, situated in Holland, declared that this their statute, although disposing as to the capacity of persons, should only have the effect of a real statute and thus be real. *Novell. decis. Ultraject. anni 1659 art. 16*, whatever

Abraham à Wesel may have argued to the contrary but in vain, *in comment ad d. art. 16, n. 18. and 19*: he was so fully and effectually responded to by my lamented father in his *treatise de mobilibus et immobilibus cap. 13. n. 4. and 5*, that he was thereafter for ever silent.

9. What we have hitherto said concerning statutes not extending beyond the territories of the statutor, nor to goods elsewhere situated, does not prevent the capacity which is imposed upon any subject by the statute of the domicile, accompanying him into whatsoever places he travels or passes through, and that in regard to goods situated in the place of the domicile, not elsewhere. For which reason a Hollander being declared a prodigal in Holland, if he contract in Ultrajectina or Frisia (where, on strict law, the Ultrajectine or Frisian magistrate would not consider him a prodigal, as already stated) and then return to Holland, the place of his domicile, he cannot be effectually summoned there on the contract elsewhere entered into; inasmuch as the Holland magistrate will be able to protect his own decree declaring him a prodigal, in regard to the goods situated in his jurisdiction. In the same way if a Holland young man, under age, testate in Frisia (where the power to do so is denied him) the Holland magistrate will consider his testament of force in regard to things situated in Holland, for to that extent he can uphold the capacity which, by his own law, he has given to his subjects, just as if, in the former case, a prodigal, or, in the latter case, a young man under age, had contracted or testated in his domicile and not abroad. These points will be discussed more fully in our title *qui testam. fac. poss.* and title *de curat. furios. (post)*. Nor does what is said above prevent the judge of the domicile laying down a law by which he forbids anyone subject to him by reason of domicile from doing anything in regard to immovables, situated in foreign territory, or even to do any acts in foreign territory; a penalty being fixed for anyone acting otherwise. He can cause this penalty to be executed against such person when he returns from abroad, or even during his absence, on the goods which are found belonging to him at the place of the domicile, and thus subject to the judge of the domicile; that is to say, if you assume that a pecuniary fine has been imposed. Hence it is not doubtful that those statutes rest on the foundations of justice and reason, by which, on threat of punishment, citizens living out of their domicile are preventing from summoning each other there; or to frequent inns near the boundaries, to use mills, or to do similar things; for perchance drink would be thus obtained out of the country at a lesser price, or grain ground, or less tribute would thus be realized from the public, and thus the taxes of the domicile would consequently be defrauded, *l. non solum 2. l. mercatoris 4. C. de commercio et mercator (C. 4. 63) waarschouwinge aangaande de dwangmolens in oud in nieuw Beyerland. anno 1657, 29 October, et anno 1661, 19 Mei, placitorm Hollanl. pag. 2488. et pag. 2654. Peckius de jure sistendi cap. 8. et de testament. conjugis. libr. 4. cap. 28. num. 8. in med. Menochius de præsuntionibus libr. 2. præsunt. 2. num. 5. Nicol Everhardus consil. 45. num. 4. 5. Rodenburgh de jure conjugum tractat. praelimin. de statutis divers. tit. 1. cap. 3. num. 2. Paulus Voet de statutis sect. 4. cap. 2. num. 10. et sect. 8. cap. 2. num. 6. 7. 9.* On this basis we find it very often forbidden with us that any inhabitant of the federated provinces should undertake a voyage from our ports or those of other Princes or States, to the East or West Indies, under the authority, and auspices of other Princes, or for the benefit of any other than either of the Indian Companies, heavy penalties being

imposed on those contravening. *Placitum Ordin. General* 9 Sept. 1606, et 3 December 1616, et 14 Dec. 1617, vol. 1 *placitor. pag. 547. et seqq.* *Octroy van de West Indische Compagnie* 3 Juni 1621, art. 1. *placitum.* 9 Juni 1621, et 10 June 1622, et 26 November 1622, d. *volum. 1. placitor. pag. 566. 577. 579. et seqq.*

10. What has been thus far said and explained concerning real and personal statutes is of force also concerning mixed statutes, which provide as to the solemnities for executing acts : and thus, if we investigate the strict law of the magistrates of any region, none will be found bound to recognise dispositions made in other places, as far as regards the goods situated in his territory, when the solemnities used were those of the place where the business was transacted, neglecting those required by the statutes of the place where the things were situated. The arguments which we have above put forward as to personal statutes prove this : and to these you may add the *argumentum ad absurdum* : when you consider that, in order to remove all opportunity for fraud, and even suspicion of it, the presence of seven witnesses to testaments is necessary in Frisia, while in Holland two and a notary suffice. Take, I pray you, the case of a Frisian or a Hollander making a will in Frisia as to Frisian goods, with the aid of a Frisian notary there recognized, and two witnesses most deserving of credit. It cannot certainly be doubted that this declaration of last will, made in Frisia and concerning Frisian goods, would be without effect ; nor would a Frisian judge accredit these three witnesses, even although they were members of the family, well known to him, and generally well known, of recognized authority, prudence and probity. And in the converse case, if you assume that a Hollander or a Frisian make a will in Holland, concerning Frisian goods, before a notary and two witnesses, and therefore follow the solemnities of the place of execution : what reason of justice or equity, I pray, would dictate that the Frisian judge would necessarily be bound to recognize the declaration of the three Hollanders, and thus ratify a disposition concerning Frisian goods, while he cannot accredit, and does not wish to accredit, his own citizens, known to him, members of the family, conspicuous for undoubted integrity, witnessing a similar act in equal number. Who will not declare it hard and unjust (unless a reason of comity counsel it, as will be hereafter said), to harbor a wicked judgment towards your own citizens : and yet fully to believe others not very different in respect of their situation of place or their disposition, not more approved for their truth, and to give them full credence because the judge of the place in which the testator made his last will has thus willed and adjudged it. Then again, if any magistrate can lawfully, altogether prohibit testamentary dispositions of things within his own province, who will not agree that it is much more permitted to him to lay down a law by which he wishes that there shall be no other form of will, as to goods within his territories, than that such as is found established according to the solemnities of the place itself, according to that very common saying that "he who is entitled to the greater is also entitled to the less," *l. non debet* 28. *ff. de regulis juris* (Dig. 50. 17). Nor is there wanting in support of this opinion, thus sustained by reason, the authority of excellent men who, although they do not all use the same reason, yet have come to the conclusion that what is *summo jure* done by minors, according to the prescribed solemnities of the place where the act is done, has no operation over goods situated in a territory where the laws require fuller solemnity ; and that this can

be so laid down by the magistrate of every place. Thus many instances are given by *Ferdin. Vasquium quæst. libr. 4. cap. 3. num. 18.* and beside others by *Tuldenus in Codicem tit. de testamentis num. 5. Rodenburch de jure conjugum tract. prælimin. de statut. divers tit. 2. cap. 3. num. 1. in med. Burgundus ad consuetud. Flandriæ tract. 6. n. 2. Christincus ad leg. Mechliniens. tit. 17. art. 1. num. 10. et ad rubricam d. tit. num. 10. Fachincus libr. 5. contro. cap. 90 et 91. Paulus Voet de naturâ mobil. et immobilium cap. 12.* Nor does it tend to the contrary that it would be absurd that one and the same testament should be established by a diverse law of solemnities, or that many testaments should be established by one such law. For although it would be so troublesome to testators that you say no one would go away, still I do not see any absurdity or injustice in this rigor of the law: no more than in this, that according to the multiplicity of regions in which the immovable goods of one who dies intestate are situate, there must be considered to be as many estates, each more particularly governed by the laws of the place where situate. The number of testaments and estates ought to be the same, as is quite just, since in testaments is laid down the disposition as to estates.

11. And thus I think I have thus far established that with regard to all statutes, real, personal, mixed, or whatever other denomination or division you may lay down for them, this is the truest rule to follow, that statutes lose all their power beyond the territory of the statutor; and that the Judge of a different country is not bound by any necessity in regard to goods situate within his territory, to follow or approve laws which are not his own. On this one point, however, there may be a doubt remaining with some, viz., if this is so, how does it happen, as will be commonly found laid down, that in successions, in capacity to testate, in contracts and in other things, movables wherever situate are governed by the law of the domicile, and not by the law of that place in which they are naturally found; since it would appear that in this respect at least the jurisdiction of the Judge of the domicile does not infrequently operate beyond the territory of the statutor in regard to things scattered over the different territories of other magistrates, even those ruling over the remotest Eastern and Western regions. But it must be considered on what fiction of law, or, if you prefer it, on what presumption of law this rule as to movables rests. Since they have no fixed and certain place of situation, nor are attached to any certain place, but can easily, at the will of the owner, be readily called back and brought from everywhere to the place of the domicile, and often seem to be of most advantage to their own when present with him, thence this conjecture seemed to arise, that it should be considered to be the wish of the owner that all his movables should be there, or at all events should be taken to be there, where he had established the chiefest seat of his fortunes (*fortunarum suarum larem summamque constituit*), that is in the place of his domicile. Thence if the Judge of the domicile have laid down anything, it applies to the movables wherever situate for no other reason than that they are considered to be in the place of the domicile itself. *Gilkenius, Chassancus, Peckius, Peregrinus, Giurba, and others cited by my father Paulus Voet de statutis sect. 4. cap. 2. num. 8. Rodenburch de jure conjugum tract. prælimin. de statut. divers. tit. 1. cap. 2. circa fin. Mævius ad Jas Lubenc. quæst. prælimin. 6. num. 23. 24. Tyraquellus de jure primogenit. quæst. 48. Responsa Ictorum Holl. part 3. vol. 2. consil. 138. num. 16. et seqq.* If,

however, anyone should think these fictions of law to be alien to the reason of natural law which has alone to be considered in such cases, inasmuch as they require one legislator common to all, introducing and establishing such fictions of law by his own law, I will not indeed oppose it; and will say I think it should be ascribed to that comity which every nation shows to every other, rather than to the rigor of law and that highest power which every magistrate has over the movables found at his domicile. Especially when I consider that the magistrate of the place, where the movables really are, can determine and decree concerning them what would displease the Judge of the domicile. For what if the Judge of the domicile orders grain to be imported because his country is troubled with a scarcity of grain; and an inhabitant of such country, with the hope of greater gain, should wish to import his grain which he has stocked in his granaries in another country: but the ruler over that other country forbids all export of grain, thus using his right over grain situate in his own country? Who, I pray, would in such a case venture to deny that movables must be governed by the law of the place where they really are, not where, on account of the domicile of the owner they are supposed to be. *Adde consult. Ictor. Holl. part 2. consil. 1. vers. nec obstat. secundum.* Nor will this the less appear from confiscations on the ground of crime, inasmuch as all the movables everywhere situate are not to be ceded to the fisc of the place where the defendant is condemned, but only those movables which are found in the place of the condemnor; unless anything else is elsewhere observed on principles of comity, as we shall give many instances of *tit. de bonis damnatorum* (post). I need not say that the statutes of most places vary as to some things, whether they are to be reckoned among movables or immovables: nor is it new that what are considered movables in one country are found placed in the catalogue of immovables elsewhere: for example annual revenues due by a Province are in Holland considered movables, in Ultrajectine immovables: the larger trees adhering to the soil are everywhere considered immovables, but in Flanders are considered movables, as is shown by many examples in *tit. de rer. division.* (post 1.8). This being so, it necessarily follows that what are considered movable at the place of domicile, but immovables where they are, are governed by the law of the place where they really are, the magistrate not even permitting, on principles of comity, that the magistrates of the domicile should follow them as movables.

12. But as each private person would pass civil life less happily in society if he refused to render mutual offices to others, and to take them in return, for his own advantage (although it could not be said that he injured anyone if, satisfied himself with a severe mode of life, and spurning the luxuries of others, he should leave to others what was their own, and keep to himself what was his: repudiating all use of commerce and of liberal duties), so also unless the magistrates of diverse countries, by not obeying sometimes their mutual laws or the laws of a superior, did not sometimes somewhat remit the reign of the law as explained above, and did not in mutual comity the one more liberally approving the commands of the other, hold them as valid, and aid them, they would make the condition of their subjects involved in very many inconveniences and difficulties, and each disturb the well-issued decrees and sanctions of the others, would overthrow them, weaken them, and thus have to allow their own decrees to be disturbed, infringed, rescinded, by the system of

like for like, and on principles of strict law. From their real statutes, however, as above described, the magistrates, as experience shows, do not recede the breadth of a nail in respect of immovables, on the ground of equity, but tenaciously adhere to their own law, and thus it has been handed down to us that immovables are only governed by the law of the situation. *Vide Mævius ad jus Lubecens. quest. pralim. 6. num. 10. et seqq. ibique DD.* But in respect of movables, in respect of testamentary disposition, when it is asked whether it is to be everywhere permitted or not, as with intestate successions, whether donations are allowed or forbidden between spouses, and in other similar questions, the rigor of the law has been relaxed by the, as it were, common consent of all nations: so that the rule springing from comity has been adopted in universal practice, that movables, where there is a doubt, are governed by the law of the place where their owner has his domicile, and wherever they may really be situated. As will be more fully laid down in their proper places, *tit. de donat. inter vir. et uxor. tit. de successioneibus ab intestato libr. 38.* and elsewhere.

13. Nor is it less prevalent in respect to mixed statutes, having reference to the solemnities of any acts, (paying especial regard to the reasonings based on the strict law, and the power of each act), that the exercise of those solemnities is sufficient for the validity of every act which the law of the place where it was carried on, required should be observed. So that, what is thus done, extends itself to all movable and immovable goods wherever situated in other territories, whose laws require very different and far fuller solemnities. This seems to have been so laid down lest testaments and contracts should be almost multiplied without end, according to the number of countries using a different law in regard to solemnities, and lest those wishing to take proceedings in regard to many things situated in many places should be involved in inconveniences, doubts, and difficulties, and also for this reason, lest many things *bond fide* done, should be too easily disturbed and almost without the fault of the doer of the act, *arg. l. Barbarius 3 ff. de offic. prætoris* (Dig. l. 4). Also because not even those most versed in the practice of the law, much less others who suffer from simplicity or sloth, and do not profess a knowledge of the law, can sufficiently ascertain, nay scarcely by the most ardent industry can any one ascertain, what solemnities are needed for proceedings in every place, and what changes are daily made in this or that region by new laws, as to the observance of solemnities. Thus, for instance, the rule which obtained as to military testaments by the civil law; inasmuch as soldiers were not bound by the solemnities of towns while they were occupied in camps and on expeditions, because they were unskilled in law, and could not consult while they were in camp with those more skilled in the law. Even this rule counsels that he who does a thing is not bound by the solemnities of a place other than that in which he did it. Because perhaps he is ignorant of the solemnities of other places, and in the place where he does the act the lawyers are not well-advised as to the customs of an alien land, since it is often found that pragmatics, before whom contracts are solemnised or testaments made, are sufficiently well versed in the law of their own country, but not in the law of all places and of the whole world, and very often the business that is to be done cannot stand the delay necessary for an anxious enquiry. Although therefore it is agreed that seven witnesses are wanted for a

testament in Frisia, while elsewhere the presence and testimony of a notary and two witnesses is sufficient, or at all events a much less solemnity is needed, yet moved by the equity of the thing, the senate of Frisia ratified a disposition concerning Frisian things made before an officer (*parochus*) and two witnesses of Sylvædux according to the custom of the Sylvæducian country. *Sande decis. Frisic. libr. 4. tit. 1. defin. 14.* And that this has been adopted in practice in Belgia, Germany, Spain, Gaul, and other countries, the writers of each nation testify. Among the Belgians, besides *Sande, Peckins de testamentis conjugum libr. 4. cap. 28. in fine. Zoësius ad Pand. tit. qui test. fac. poss. num. 49 et seqq. Vinnius select. quæstion. libr. 2. cap. 19. Christianus ad leg. Mechliniensis. tit. 17. art. 1. num. 10. et vol. 2. decis. 3. num. 7. Radelaar. Curias Ultraject. decis. 126. Consult. Juris cons. Holl. part. 2. cons. 133. et 189 et part. 3. vol. 2. consil. 15. num. 4. et consil. 133. num. 1. Rodenburch de jure conjugum tract. præliminar de statut. divers. tit. 2. cap. 3. num. 1. et d. tit. 2. parte alterâ cap. 3. num. 1. Ant. Matthæus de auction. libr. 1. cap. 21. num. 37. et libr. 2. cap. 4. num. 34. Paulus Voet de statutis sect. 9. cap. 2. num. 2. 3. 9. D. Joh. à Someren de jure novercarum cap. 7. num. 1. Abr. a Wesel ad novell. constit. Ultraject. art. 1. num. 12. 13. Jacobus Coren obs. 23. num. 18. 19. 20. Gereformeert Landrecht van Nywegen. tit. 22. art. 3. 4. Among the Germans, *Andr. Gayl libr. 2. observ. 123. Mynsingerus cent. 4. obs. 82. num. 3. et cent. 5. observat. 20. num. 4. et seqq. Maevius ad Jus. Lubecens. part. 2. tit. 1. art. 16. et de arrestis cap. 20. num. 5. Carpsenius pract. crimin. part. 2. quæst. 54. num. 51. Among the Spaniards, Ferdinand Vasquius, quæst. libr. 4. cap. 3. num. 17. 18. 19. Menochius libr. 2. præsumpt. 2. num. 7. Among the Gauls, Mainardus libr. 5. decis. 92. Guido Papæ decis. 162. Choppinus de moribus Parisiens. libr. 2. tit. 4. num. 2. Barry de successionib. libr. 1. tit. 1. num. 46.**

14. This rule obtains unless it shall appear that anyone, to avoid the more inconvenient and perhaps more expensive solemnities of his own domicile, has, without any necessity, and in fraud of the statute of his domicile, gone to another place for the purpose of passing the act, and immediately returned. It is scarcely to be expected that the validity of this act or this testament should extend itself to goods at the place of the domicile, for he is unworthy of any benefit and comity who deliberately and fraudulently spurned, circumvented, deceived the laws of the domicile. To the same class must they, I think, be referred who, when at their domicile heavier dues were to be paid to the fisco for a sealed charter, proceed elsewhere, that they may defraud the stamp law, to a place where such a kind of tax is unknown, and, when the act has been perfected, return to the place of the domicile. *Ant. Thesaurus quæst. for. libr. 2. cap. 8. num. 14. Maevius ad Jus. Lubecens. quæst. prælimin. 6. num. 6. 7. et part. 2. tit. 1. art. 16. num. 11. Paulus Voet de statutis sect. 9. cap. 2. num. 4. et num. 9. except. 3. Besides Mascardus and Aretin. and others there cited. Or unless the statute expressly forbids that an act shall be otherwise done beyond the territory and with other solemnities. Vide Menochius libr. 2. præsumpt. 2. num. 6.*

15. Having stated this general law as to the solemnities to be observed, we must further enquire what has to be laid down if any one doing an act in any place, neglects to follow the laws of that place, but follows those which either the statutes of the domicile or of the place where the thing is situated require, whether they are different



or lesser. Mynsingerus indeed, and Michael Grassus pronounces acts thus done to be of no force, whether the doer beyond the domicile has observed the solemnities of the domicile, or those which are required in the place where the immovable is situated. *Mynsingerus centur. 5. observ. 20. num. ult. Grassus recept. sent. libr. 1. § testamentum quæst. 54. num. 24. in fine.* But without just reason. For as it has been already said that anyone is both by reason of domicile, and of immovables, subject to the magistrates of the places where he has fixed his domicile or possesses immovable property, and as every magistrate according to the strict law "*jus summum*" (concerning which we have discussed above, and which applies here), does not act wrongly in defending the force of his statute as far as he can, it would certainly therefore be unjust towards one subject to him by reason of domicile or goods, if, in respect of the goods lying within his own territory, he did not hold good that last will or contract of such subject, in which he sees that his own statutes as to solemnities have been observed. Especially when in this manner defending the force of his own statute, he does not disturb or subvert what has been elsewhere done, and therefore can in no way do injury to magistrates of another region. Let us take the case of an Ultrajectine who has his domicile in Ultrajectina, possesses immovables in Holland, and dies in Frisia, having there made a will before a notary and two subscribing witnesses, and therefore having there observed all the requisites with which the Holland and Ultrajectine laws are content. On principles of equity and fairness the Hollanders would uphold such a disposition as far as it concerned immovables in Holland, and the Ultrajectines would do the same with respect to Ultrajectine immovables, but as regards movables wherever situated, they would consider them as, by a fiction of law, existing in the place of the domicile. For in a disposition of such things every one follows the solemnities prescribed by their own laws; in the same way that formerly the prætor often upheld testaments invalid by the strict civil law, because he saw that in them the solemnities enjoined by his own edict had been observed, *§ non tamen. 6. Instit. quibus modis testament. infirm. (Inst. 2. 17), l. postumus 12, l. filio. 17. ff. de injust. rupto irrit. fact. testam. (Dig. 28. 3).* Rodenburch *de jure conjugum tract. praelimin. de statutis diversis tit. 2. cap. 3. num. 2. et cap. 4. num. 5.* For as it is just that he should be considered unworthy of the benefit of a statute who has not followed it, but has acted contrary to it *arg. l. ult. § sin autem 14, in med. C. de jure deliberand. (6. 30).* Christinaeus *ad leg. Mechlin. in praelud. num. 49*, so on the contrary it would be most equitable, no one can rightly deny it, that he should enjoy the benefit of a statute who has followed it, in so far as concerns the goods situated within the territory of the statutor. And although some admit this where a statute favorable to the domicile has been observed, they deny its application where a statute has been observed disposing of things beyond the domicile. Francis de Barry *de successionibus libr. 1. tit. 1. num. 46. in med.*, although, as no reason of difference can be given why the judge of the domicile should, more than the judge of the place of situation, uphold those acts in which he finds his own solemnities observed, I do not thus consider that the opinion of these writers rests on a sufficiently just foundation.

16. We shall now next inquire concerning personal statutes, in how far they operate, on principles of comity, beyond the territory of the statutor, in respect of goods situated in another territory. As this,

however cannot be defined by any certain rules, nor deduced from any universal principles commonly received and approved by the mutual consent of nations, I think it more advisable to treat of these questions singly in the way proper to each: thus whether one capable by the law of his domicile of testating can dispose of goods elsewhere situated, where the law declares such an one incapable of testating: whether one legitimated, or declared a prodigal in the place of his domicile, is to be regarded as such everywhere wherever his goods are situated: and many other questions of the same kind.

17. Lest the exercise of comity and of assisting offices should be vague, uncertain, and often not mutual among neighbouring nations, and lest the one should deny to the other those things which he had himself obtained on principles of comity, it has been frequently laid down by special agreements, or inveterate customs to be observed as agreements, what must be mutually rendered. Thus it has pleased many, and has obtained in use in many places, that sentences passed elsewhere shall be executed on the goods found within the jurisdiction of any judge when he has been asked to allow it by the judge of another territory. And by mutual consent and general custom the judges in Germany can extend their relegations beyond the limits of their territory, as is laid down by *Besoldus delibet. juris liber. 1. quest. 45.* By the same consent the Hollanders can extend their relegations also to the Ultrajectine territory, and, mutually, the Ultrajectines can extend theirs to Holland territory, as is well known. That two Hollanders shall not mutually sue each other in Ultrajectina, nor two Ultrajectines in Holland, and that those who do so shall be repelled by the judges from the threshold of the Court, or otherwise that such litigants, if admitted, shall be bound by their own law, this has been established by special pact among the Courts of each province. 23. *Aug. 1657. et subsequente placit. Ordin. Holl. 19. Juli 1658, vol. 2. placitor. Holl. pag. 1159 et seqq.* In a similar manner it was not long ago agreed between them also that where a curator is appointed at the place of the domicile over the goods of those who are dead, insolvent, and the like, such curator shall have right and authority over goods situated in another territory, although very little of the goods be found at the place of the domicile and although the lesser number of creditors be there: also, that at the place where the curator is appointed, the universal ranking, etc., of creditors shall be made, according to the Ultrajectine placat promulgated 18th April, 1689. And, for the sake of establishing greater concord, the Hollanders have by mutual consent remitted very much of their law in favour of the Zeelanders, and these again in favour of the Hollanders, and have promised assistance, by statutes, in mutually assisting each other, both in the cases stated above and in other cases which can be reduced to the heading personal statutes: this is abundantly shown by various compromises made at various times between the heads of each province. 7 *March, 1607; 21 Sept., 1662; 7 June, 1669; especially 11 June, 1674, art. 5. 6. 7. 8. vol. 3. placit pag. 692.*

18. It remains for us to inquire whether, and how far, it is permitted to private persons, by pacts and agreements, to recede from the dispositions of statutes. To do this, I think we must distinguish between those which have reference to the public utility (to which head are to be referred those which belong to public morality and those which belong to the solemnities and forms publicly laid down for acts) and those which primarily concern the right, advantage, and favour of

private persons. As regards the former, since the public law cannot be changed by private pact, and the rights of the State cannot be traded in by private persons, and since no one can rightly renounce another's benefit, and far less the public benefit or public morality, and as such a renunciation could not be otherwise than base and therefore also impossible: *arg. l. filius qui 25. ff. de condit. Instit. Dig. 28. 7*), the consequence is that no private person can validly contract as to things which do not concern his own private estate, but the public and the public loss, *l. juris gentium 7. § si paciscar. 14. 15. 16. ff. de pactis (Dig. 2. 14), l. jus publicum 38. ff. Eod. tit. Andr. Gayl libr. 1. observ. 40. Maevius ad jus Lubecens. quaest. praelimin. 9. num. 76. et seqq. Groenewegen in not. ad Grotii manuduct. jurisprucl. Holl. libr. 3. cap. 24. num. 16*. If it is agreed that it is on those laws which are contained in statutes that the rights of private persons depend, we must first see whether the statutes, which ought to obtain in a particular case, are prohibitory, or whether they make simple disposition. Those are called prohibitory statutes by which it was specially forbidden that anything should take place, as that no one remarrying should leave more to his wife than to that child of the former marriage to whom he had left the least portion, lest in this way there should be introduced among spouses a statutory community of goods, although the marriage had been entered into without dotal pacts: that spouses should not mutually donate to each other: that they should not gratuitously benefit each other: that there should be no testaments as to immovables. Therefore among prohibitory statutes are never to be reckoned those which simply state the law from a negative point of view, as for instance that community shall not be introduced among spouses by marriage: that a spouse shall not succeed to a deceased spouse: but only if it is found so laid down, there can be no community between spouses by virtue of marriage, nor any testamentary gratification. If statutes are prohibitory, whatever is done or contracted against such prohibition is to be considered of no force, or whatever is done by last will, as regards goods situated in the territory of the statutor: whether this is done by those who have their domicile in the territory of the statutor or by others who have the chief seat of their fortunes elsewhere, where such a prohibition is not of force. For otherwise if renunciation were admitted every law would be without force of obligation and therefore would lose the effect of law, *arg. l. 1. 2. O. ne fidejuss. dot. dentur (C. 5. 20). Gothofredus ad. l. 71. ff. de contrah. emt. Grotianus discept. for. cap. 785. Maevius ad jus Lubec. quaest. praelimin. 9. num. 84. Rodenburch de jure conjugum tract. praelimin. de statut. divers. tit. 3. part. 1. cap. 4. num. 1. 2. et. seqq. D. Someren de jure novercarum cap. 1. num. 2. Choppinus ad leges Andium libr. 3. cap. 2. tit. 3. num. 9. Loiiet en ses arrest. lit. D. num. 17. versu les heritiers*. Thus (to make the point clear by an example) it would be in vain if a Hollander were to bequeath to his wife immovable property situated in Ultrajectina: in vain if he were to make a last will concerning immovable property there situated, since the power of testating is wholly forbidden there. These points will be more fully discussed in their proper places. But if the statutes do not contain any prohibition but simply declare what should be done in the case of private persons, it is not doubtful that their provisions can be renounced by pacts and dispositions. If, for instance, the statutes define what shall be the succession *ab intestato*, nothing prevents anyone, to whom the power of testating is given by statute,

to recede from the prescribed order of succession and take another at will, whether by calling those who are more remote, or those who are entirely strangers, to the succession. The statutes of different regions introduce a universal communion of goods between spouses, but there is nothing which forbids anyone wholly or partly departing from it by pact: just as, *vice versâ*, where the statutes have introduced only a community of gain (*acquæstum*), no further prohibition being prescribed, it is free to everyone, by dotal instruments, to extend this community beyond one of gain and so as to include all goods. Frisians therefore would not offend against the rule when, by antenuptial pact, they introduce a universal community in regard to certain things, even those situated in Frisia itself, although the Frisian laws only sanction a particular community on marriage. Nor again the Hollanders, if content with a particular community of gain, they renounce the Holland statute by which a universal community is established.

19. As any one can do this by express wish, so there is nothing forbids him to recede from the provisions of such statutes by tacit and presumed desire. And since everyone is presumed to know, or at least can easily know, the laws of his own domicile, if not the laws of all countries, throughout which perhaps the goods of some rich person may be found scattered, the consequence is that we may presume, in case of doubt, that everyone contracting as to his own things wished to do, to cause, to establish that which the law of his domicile, known to him, dictates: because if he had wished otherwise in contracting, he could have otherwise specially pact. Hence the saying has arisen that everyone, in case of doubt, is considered to have wished to conform in contracting, and to have conformed, to the statutes of his domicile. This is also founded on Roman Law, in which it obtained that, in case of doubt, everyone is presumed to have contracted according to the custom and law of that region in which he contracted *arg. l. semper 84. ff. de reg. juris* (Dig. 50. 17): *l. quod si nolit 31. § quia assidua 20. ff. de aedil. edict.* (Dig. 21. 1). *Maevius de arrestis cap. 12. num. 6. 9. 10. 11. Deckhorus libr. 1. dissert. 11. num. 20. 21. Jul. Clarus § testamentum quaest. 76. num. 12. Paulus Voet de naturâ mobil. et immobil. cap. 18. num. ult. in fine.* This rule rests on this foundation, that the community of goods which is of force by statute in the place of the domicile of those contracting marriage, extends to all goods, even those situated in those places where the statutory community of all the goods is unknown: and because *vice versâ* it does not obtain when those entering on matrimony have their domicile in a place where, according to statute, only the community of gain is received, although the spouses possess goods situated there where a universal community is established by law, as more fully stated *tit. de ritu nuptiarum* (post).

20. These tacit and presumed pacts do not, however, extend themselves to goods situated in those places where there is a prohibitory statute: since the force of such a statute cannot be taken away by express pact, as already stated. Nor would they even find place, nor is anyone to be presumed to have otherwise wished to conform himself, in contracting, to the laws of his domicile than in so far as the law of the domicile itself gives full power to its citizens of receding, by pact, from what has been laid down by statute, and of thus not conforming to them, if he so saw fit. But when the law of the domicile does not permit citizens to reave from their disposition, but forces and constrains those who are unwilling to stand by what is defined by law, as,

it has been already admonished, is the case in prohibitory statutes, it would be absurd, from such an act, often unwilling and imposed upon the unwilling, to seek, as it were, a certain presumption of a tacit pact which would be in conformity with the statute of the domicile and would extend itself to goods situated in those places where the contrary laws are found enacted admitting a contrary pact. For it cannot be said that one would wish to follow, in a case of doubt, the laws of his domicile in as far as concerns goods elsewhere situated, and yet not in regard to those same things so situated in the law of his domicile to have resiled from the statute of his domicile, if it had only been allowed him by such statute. *Menochius de præsumpt. libr. 4. præd. 202. num. 21.* On this foundation it, *inter alia*, rests, that where second marriages are contracted simply, without antenuptial pact, by Ultrajectines on Ultrajectine soil, where statutory community is rejected on account of the approved disposition *hac edictali 6. C. de secundis nupt.*, still in as far as regards immovables situated in Holland and belonging to the second, Ultrajectine, spouse, the community of goods ought not to be considered as excluded. Concerning this more will be found in the matter of second marriages.

21. Nor do you sufficiently or rightly assume a tacit presumption of this kind, of conforming to the statute of the domicile where nothing has been at all carried on, done, or contracted by the owner of goods elsewhere situated, but where he has wholly abstained from all disposition allowed him by the laws of the place where the thing is situated. In this way it happens that, as many as die intestate, obtain here and there different heirs according to the varying site of the immovable property, the inheritance being thus divided into as many places having diverse laws of succession as there are estates of the deceased found. Tacit pacts were both known to the Romans, were not infrequent in the usages of nations, can be easily conceived, and presumed from probable circumstances. But tacit testamentary dispositions are as entirely foreign to our law as to the Roman law: so that hence it cannot be said that one, dying intestate, tacitly called his cognates to the succession in the order dictated by the law of the domicile. For although Paulus in *l. conficiuntur 8. § sed ideo 1. ff. de jure codicill.*, says that, when the father of a family dies intestate, he is "believed (Dig. 29. 7) voluntarily to leave the lawful inheritance to these (the heirs *ab intestato*):" it is not on that account a tacit testament, nor an inheritance left by testament but by law, and it is therefore called *lawful* by Paulus in this passage, even when it is not transferred with full solemnity: although it naturally agrees with the wish of the dying man. I need hardly say that it is absurd to imagine any constitution of a tacit wish, conformably to the laws of the domicile, in regard to the transfer of an intestate succession, since we know that even the estates of those are transferred *ab intestato* who, on account of youth or defect of mind, can give no manifestation of wish. That the contrary of this is found in testaments the thing itself shows: for no one is supposed to have tacitly contracted, or to be bound by tacit contract, who is not of such a condition that he can also enter into an express contract. This is manifest from the examples of tacit pacts enumerated in *tit de pactis* (post). Nor is it the case, as may be retorted, that quasi contracts are tacit agreements, arising from some fact or deed from which madmen and others like them, not able to contract, expressly can, it is admitted, be bound without the consent of tutor or curator, *l. furiosis 46. ff. de oblig. et act.* (Dig. 44. 7).

For there is more a presumed than a tacit agreement in quasi contracts, as will be elsewhere more fully stated; and besides, there is this difference between tacit pacts and those quasi contracts by which madmen and the like can be bound without their curator:—that tacit pacts require the act of him who is thereby bound, or the remission of an obligation due to him, so that by his act he declares his consent. But in quasi contracts there occurs the act or desire of one who does not himself wish to be bound by such deed, but rather primarily intends that another shall be bound to him; or is supposed to have so intended, by carrying on a business, or paying what is not due. Thence in the case of that quasi contract where the obligation arises out of the act of him who was to be bound, as for example from the adiation of an inheritance, no obligation arises from the mere act of the minor, the madman, or the prodigal, but the authority of the tutor or curator is necessary, § 1. *Instit. de auctor. tut.* (*Instit.* 1. 21. 6. 1), *l. si infanti.* 18 *pr. et § seq. C. de jure deliberandi.* (*C.* 6. 30. 18). All which, thus adduced by me, goes to prove that where there is no act there can be no tacit pact, and from similitude of reason, no tacit testament: for both in testaments and agreements a declaration of will is necessary, either signified by words or writing, or by the thing itself and the act. Where these modes of interposing consent are wanting, the consequence is that a tacit pact is ineptly sought or a tacit testament conceived.

22. Further concerning the interpretation of statutes and the power of making them, their abrogation, and other matters which are of kindred nature, I refrain from saying more in this place. Many of these points are sufficiently evident from what I have above said as to the laws and their interpretation; and as to what ought to obtain in particular controversies as to the variety and power of statutes, according to the general principles here laid down by me according to the best of my ability, I have resolved to treat in their proper places and in the suitable order of each subject matter.

TITLE V.

ON THE STATUS OF MEN.

1. Status or condition of persons is various, and therefore the divisions of men are various:—rulers, subjects; majors, minors; male, female, or hermaphrodite classed with the sex prevalent in it. The males mostly have the same right as females. Therefore, what is said about husbands and the male sex is extended to the female sex, if the law does not otherwise provide. But sometimes the condition of women is better, sometimes worse than that of men. Better in so far as they enjoy the privilege of the *Senatus Consultum Velleianum*, are not prejudiced by ignorance, are punished less than men. Worse, for they cannot be magistrates nor fill public offices. In succession, feudal and allodial, they are postponed to men.
 2. The olden division was into citizens and strangers. By the Roman law citizens enjoyed far more privileges than foreigners. Shows this. So in Holland there was also such a distinction formerly, which has vanished with commerce. Strangers naturalized on payment.
 3. Slavery was formerly in vogue. Now abolished. The author makes an exception in the case of captives taken in war with barbarous nations. In some parts of Holland, even after abolition of slavery, there was a mitigated form approaching to feudalism.
 4. Distinction between patricians and plebeians: now abolished.
 5. Distinction between those born, unborn, and in the womb. Although those in the womb cannot be considered as coming under the appellation of men, their nativity being uncertain, still by a fiction of law they are considered as born, whenever it is for their advantage. Examples drawn from slavery while still in force, the condition of the mother not prejudicing the child. Just as inheritances are transferred to those born, so also to those about to be born, and in the womb. If the advantage be not to those in the womb, but to third persons, this fiction of law ceases. Therefore what is not beneficial remains in suspense from the nativity. Therefore posthumous children passed over by the father, while in the womb, do not break a testament until born. The testament remains good if there is an abortion or a monster. When called to the hope of succession with others, collation is only to be made on birth, for then only can heirship of one in the womb either bring loss, or a benefit; except that where a third person might also be temporarily benefited, the law allows the third persons also to share the benefit till the birth happens. A mother's capital punishment postponed during her pregnancy. As the fœtus cannot be nourished unless the mother is, therefore a pregnant mother must be suitably supported from the inheritance, into the possession of which she is put in the name of her child. Even if she has abundant means of her own: for the support thus given is considered given to the child in the womb.
1. The status or condition of men is various; and thence arise various divisions of men. For not to mention that some rule and others obey: that some are majors others minors, which distinctions will be discussed in their proper place, there is a notable distinction, bringing with it varied consequences in law, between males and females,

hermaphrodites being reckoned among that sex which is most prevalent in such hermaphrodite, *l. quæritur* 10. *ff. h. t.* (Dig. 1. 5. 10.), *l. repetundarum* 15. § 1. *ff. de testibus* (Dig. 22. 5. 15); *l. sed est quæsitum* 6. § ult. *ff. de liberis et posth.* (Dig. 28. 2.). For although often, and indeed in by far the most branches of our law, men and women have the same rights, so that what is said of men, and is laid down as to the male sex, is also to be extended to women, if nothing else is provided by law, *l. 1. l. pronuntiatio* 195. *ff. de verbor. signif.* (Dig. 50. 16.) *l. ait prætor* 3. *pr. et* § 1. *ff. de negot. gestis* (Dig. 3. 5.), *l. quod et lex* 3. § hæc verba 1. *ff. de homine libero exhib.* (Dig. 43. 29.) *l. si quis ita* 16. *in pr. ff. de testam. tutelâ* (Dig. 26. 26.) *l. patroni* 52. *l. quisquis mihi* 116. *l. Servius ait* 122. *ff. de verb. signif.* (Dig. 50. 16.), still in some respects the condition of women is found to be better and in some respects worse than that of men *l. in multis* 9. *ff. h. t.* (Dig. 1. 5.). It is better, in so far as they rejoice in the benefit of the *Senatus Consultum Vellejanum*; in so far as in very many cases any ignorance of the law under which they labour does them no harm; and in so far as they are more leniently punished for crimes than men are. Their condition is worse, since they cannot be magistrates; nor fill public or other civil offices, *l. jæmine* 2. *ff. de regul. juris* (Dig. 50. 17.); although there are not wanting cases when, removed from the law, they also like, as a matter of fact, to take part in public things, abusing the power of their sons and husbands. "There seem to be some mothers (say Seneca *consolat. ad Helviam* cap. 14) who exercise the potency of their children with the impotence of a woman: who, because it is not allowed to women to fill positions of honour, are ambitious of them: who, by proffering their eloquence to others, fatigue them." According to the customs of different nations women are postponed to men not only in feudal but also in allodial succession: as will be more fully discussed, with many more matters, in their proper places.

2. Anciently men were divided into citizens and strangers; those rejoicing in the right of being a Roman citizen excelling strangers in many ways. These differences between citizens and strangers according to the olden law, Brissotius very fully enumerates *antiqu. libr. 1. cap. 13.* [Having given further particulars as to the Roman law in this respect, which, being now matter of antiquity merely, it is considered unnecessary to translate, the author proceeds]. Not very different from the Roman customs were the disabilities by which in ancient times strangers were distinguished from citizens throughout Holland, and many other provinces and regions, for anciently they could not be fit witnesses against citizens, nor could they fill positions of honour; when injured they were more lightly compensated, and lastly the fisc succeeded to them. But when, for the purposes of commerce, very many strangers began to come into these regions, the condition of strangers and citizens began to be equal in very many respects, excepting in town and municipal magisterial honours, which were only bestowed on the citizens of each State, excluding strangers, as the municipal laws everywhere provide. Nor is it difficult for a stranger by paying a small sum or price to the Public Treasury, to obtain a concession of rights from the magistrate of any State. *Hugo Grotius Manuduct. ad Jurisprud. Holl. libr. 1. cap. 13. per tot. (Maasdorp's Transl. p. 54.)*

3. This section referring only to the abolished distinction of free men and slaves, is unnecessary to be translated.

4. The same with this section, which treats of patricians and plebeians, nobles and commoners, to whom however modern society accords equal rights. (See Maasdorp's Grotius p. 56.)

5. Between men already born and to be born, or still in the womb, the laws draw certain distinctions. With regard to those yet in the womb, although, properly speaking, they cannot yet fall under the appellation of men, by reason of the uncertainty of their nativity, the kingly laws paid more consideration to, as it were, the *hope of life*, and regarded them as born, *l. negat. 2. ff. de mortuo inferendo* (Dig. 11. 8.): by a fiction of law they were considered as already born whenever the question of an advantage to them arose, *l. qui in utero est. 7. et l. qui in utero sunt. 26. ff. h. t.* (Dig. 1. 5.). For which reason a misfortune happening to the parents after conception cannot hurt the infant in the womb: (here follow obsolete examples taken from slave mothers, and patrician fathers, after which the author proceeds). Legal inheritances may be transferred to those yet to be born, and in the womb, as well as those already born, *l. qui in utero sunt. 26. ff. h. t.* (Dig. 1. 5.) the portions of these are reserved until they are born *l. antiqui 3. et l. 4. ff. si pars hered. petatur* (Dig. 5. 4.) But if it be not the benefit of those already in the womb which is in question, but the benefit of a third party, this fiction of law by which the unborn are considered as already born, ceases, nor do they benefit others until born, *d. l. qui in utero est 7. ff. h. t.* (Dig. 1. 5.), *l. quod dicimus 23. ff. de verb. signif.* (Dig. 50. 16.) Hence those things which cannot benefit those not yet born, also remain in abeyance from the time of nativity, for which reason posthumous children passed over by their father, while yet in the womb, do not break a testament, but only on their birth; the testament remaining good if an abortion or a monster is produced, *l. uxoris 2. l. 3. C. de posthumis hered. instit.* (C. 6. 29.), and not being called to the hope of succession together with others, collation is not to be made by others unless those in the womb be afterwards born, for until then they do not in fact become heirs *l. ult. ff. de collation.* (Dig. 37. 6) and *l. posthumo 11. C. cod. tit.* (C. 6. 29.). But clearly if he who is in the womb cannot otherwise avoid loss, or reap an advantage, than by also temporarily benefitting a third person, the laws allow a third person also to be a sharer in the benefit until the birth of the child. And as the offspring cannot be safe when a pregnant mother is condemned to punishment, and its birth would be very much endangered if she were to be subjected to questionings, both punishment and torment of a guilty or accused mother is in practice postponed until she has given birth to the child. *l. pregnantis 3. ff. de pœnis* (Dig. 48. 19). *Imperator 18. ff. h. t.* (Dig. 1. 5). *Paulus recept. sent. libr. 1. tit. 12. § 5.* And as the offspring cannot be nourished unless the mother is nourished, the consequence is that aliment must be given to the pregnant person, suitable to her condition, out of the inheritance; into the possession of which therefore the mother is put, in the name of the child, although she have abundant other means wherewith she can support it; for such things are regarded as given to the infant which is in the womb, *l. 1. § mulier autem 19. l. curator. 5. ff. de ventre in posses. mitt.* (Dig. 37. 9.)

TITLE VI.

OF THOSE WHO ARE THEIR OWN MASTERS OR ARE UNDER POWER OF OTHERS.

SUMMARY.

1. Another division of persons is into: *a, sui juris*, those who are their own masters, freed from the paternal power, and are called *pater familias* whether above or below puberty: a ward *impubes* may be *sui juris*. Or, *b, alieni juris*, those under paternal power.
2. Paternal power is the right which Roman citizens, males not females, had over their children born in lawful marriage, or legitimated, or adopted. Whether they know of their birth or not. Mad men, idiots, or otherwise afflicted could not use this power, whether over children born before or during insanity. Even where paternal power is required to be manifested by a deed or by consent, the act of a mad father is not waited for. His children enter on inheritance and marry without father's authority. Any advantage accruing still goes to the father, e.g., emoluments of inheritance, paternal power over grandchildren; for otherwise to the calamity of madmen would be added an ademption of right. The same with a prodigal *paterfamilias*.
3. Formerly this paternal power was very extensive and gave a sort of property-right in the child to the father and grandfather. Afterwards lessened to correction, or even exclusion from the inheritance, for ingratitude. If the child's offence exceeded administration of home correction, it came before the Judge. The mother had similar power; and there was the same right over emancipated children. This power of the father over the children not emancipated, consisted partly in acquiring, administering, substituting, giving guardians, consenting to or dissenting from marriage; all which are treated of in their proper places. The Roman paternal power is departed from by most nations except the Frisians, who adhere very much to the Roman law. Or if not departed from, shared with the mother. The father, with us, cannot sell his children in case of necessity, as formerly, nor acquire them as a part of the *peculium ulventitium*, nor make pupillary substitution, nor has he more power of substitution than mother. The father's consent is required for marriage, and failing that the mother's consent is necessary up to the same age. By the Roman law the grandson was in the grandfather's power; by our law only in the father's, nor on his death does he come into the grandfather's, for marriage emancipates the son from his father's power, and the grandson follows the father. Therefore only the consent of the father and mother, not of the grandfather or grandmother is wanted for marriage.
4. Paternal power constituted in three modes:—marriage, legitimation, and adoption, including by sentence of the Judge, when those emancipated for ingratitude are recalled into the paternal power, or when the Judge was in error and declared them *sui juris*, when in

fact they not so. The sentence stands, but is relieved against by the Princeps. By marriage, if born in the legitimate time, that is from the beginning of the 7th to the beginning of the 10th month : so that a child born in the 7th month after marriage, or later, is legitimate. For on the authority of Hippocrates it is received that a child can be born perfect in the beginning of the 7th month, and also in the 8th, 9th, 10th to the beginning of the 11th month after dissolution of the marriage, by death of husband, divorce, or absence. When the 10th month has elapsed from the time of absence or dissolution of the marriage the children cannot be reckoned as legitimate, and therefore are not subject to the potestas. Much less if, with Ulpian, we suppose the husband to have been absent 10 years, and on his return to find a one year old in his house. The medical men are not sufficiently agreed as to the extreme period of gestation, as sometimes we find that by fear or other sudden emotions women give birth to premature children ; and, conversely, that the time of birth is sometimes retarded on account of domestic grief, weakness of health, natural want of powers, poverty of food and the like. A margin is properly left to the discretion of the Judge, as long as, after weighing carefully the circumstances, the antecedent life of the woman, her morals pure or suspected through public report, and using further the assistance of skilled doctors, he does not depart from the limited definition of 10 months ; more especially as laws are passed for known and frequent cases, and not for those which occur with difficulty, or very rarely. Thence even in very rare cases the legal time need not be exactly observed. Wherefore, the report and presumption of modesty warranting it, a child born in the twelfth month has been declared lawful by the Court and the heir of the deceased husband.

5. If the child is born in the 6th or 5th month after marriage, or sooner, since it cannot be living and perfect according to the opinion of the medical men, it is unnecessary that we should enquire as to the father's right. If, however, it happen to have been born perfect and duly formed, the husband is not bound to acknowledge it or support it as his own, provided he deny connection before marriage, and swear to it if demanded. If any one before marriage had secret connection with a maid, and then lawfully married her and did not deny the previous intercourse, it is beyond doubt that the child is ranked among legitimate children immediately on the solemnization of the marriage, even if born on the nuptial day. The subsequent marriage removes the stain : since even those born before marriage can be legitimated, and after marriage there can be no concubinage.
6. The presumption is in favour of the child born in lawful marriage, that he is legitimate ; and so the law declares. To prove legitimacy it is sufficient to show that that one is born in lawful marriage. Even in doubtful cases the power to generate and the connection of the spouses is presumed, nor is it to be assumed that he who lives daily with his wife would refuse to acknowledge a child born from her as his own ; unless the husband had for a long time not cohabited with his wife on account of illness or impotence. This being proved, such a child born in the father's house, even if the neighbours knew it, would for a manifest reason not be regarded as the husband's child.
7. What then if the mother give birth to the child in the time in which pregnancy could occur, say the 8th or 9th month after marriage, but denies that her husband is the father : whether before the birth or in the agony of labour : saying that it was conceived of another : would it be the legal offspring of the husband ? Certainly not, if there were no proof except the woman's confession. It is safer that the woman should not thus be allowed to injure herself even by a sworn declaration and be open to action for adultery, and to be repudiated. And that the child should be regarded as legitimate and be

acknowledged, supported, and at the proper time benefitted as heir; even if the husband be unwilling and without legitimate proof deny that it is his child. For the child born in the husband's house is presumed to be the child of him and his wife, and the mother being clear, the father is arrived at on presumption as being he whom the marriage points out, unless the opposite is clearly established. It should rather be assumed that this declaration of her own turpitude emanated from an insane or disturbed imagination; or from a hatred and anger against her husband, which is a short-lived madness. S. lays down that a woman's assertions repudiating her child on account of anger or otherwise were not to be believed. Where it is doubtful if there is any anger, the law regards such assertions as false, and as made by those of insane mind, and containing a malignant judgment of parents towards their children, until the truth of the assertion is proved otherwise. Mere asseveration and lying professions cannot, although either spouse consent, prejudice the children and the birth.

8. If it be not the mere assertion of the mother, but if she have been convicted of adultery, the child is not even then to be presumed adulterous, but rather, where there is a doubt, that it was born from the husband, as long as he, during the time of possible conception, cohabited with his wife and was without manifest impotence. Nor should the crime of adultery, objected to the mother, prejudice the infant, for she might have been an adulteress and yet the child may have been the child of the husband. Moreover, where a thing can be traced to a lawful and an unlawful cause, where it is doubtful, the presumption should be in favour of a lawful and honourable act.
9. A difficulty arises where the woman, having neglected the year of mourning, married again shortly after her husband's death, and gave birth to a child, which could have been conceived from both the first husband and the second husband; say in the ninth month after the death of her husband, and the 7th from her re-marriage. Some think it should be considered the child of each husband, supported by the funds of both and admitted to the inheritance of both. Some would leave it to the election of the child whether he would be the heir of the deceased or the surviving husband. But the first involves an impossibility, and the second is ridiculous, and repugnant to nature to allow one to have a choice of fathers. Others think that the child should be considered the child of neither, on account of uncertainty, and deprived of the inheritance; inasmuch, not that the right failed him, but the proof thereof. But Voet does not think this is admissible that one born in marriage should then be accounted illegitimate; nor the view of those better who wish the matter decided by asking to whom does the child bear more resemblance; for though often similar to their parents, children are often very dissimilar, or more like the mother, or strangers, than the father. It is more probable in theory, and more consistent with the analogy of the law, that the child belongs to the second father, not only where the first father was perhaps weakened by the long suffering to which he succumbed, but where he died suddenly and had the opportunity of procreation shortly before his death. For it has been said before that a perfect child can be born in the seventh month. By law a child is supposed to be lawful which is born from a wife where the husband is cohabiting with her. Therefore, when there is a doubt proved, it is not to be borne that one should deny that a child born in his house is his, when he has no lawful means of repelling the presumption. Wherefore he owes it to his own rashness that he married too soon, before it was certain that there was no hope of offspring from the first husband. For the law provides that he who contracts with another should not be ignorant of that other's condition. He is the more bound to support and make his heir one

who may perhaps not be so really, for he is the author and cause of the uncertainty, and caused the confusion of blood and seed by his premature marriage. The deceased therefore should not be burdened with the burden of acknowledging one as his own, he having been free from all blame of the confusion. The second husband may attribute it to himself that he of his own accord landed himself in straits which he would have avoided had he followed the principles of the law.

10. A child born from one betrothed before the spouses had given a "present consent," according to the Roman law, or within the time required for banns, and before the solemnization of marriage in church or the authorities required by law, and where the father dies, is still considered as legitimate, for he is not regarded as a despiser of the law who, prevented from death, was not able to go through the necessary solemnities. Consent alone makes a marriage, although concubinage have not intervened; and, moreover, in the case of connection with a free woman, marriage is presumed where doubtful. Therefore a marriage is not invalid for the omission of pomp and other solemnities of marriage. Many, moved by these considerations, regarded the child as, if not wholly legitimate, at least so far so that he can succeed to his father and agnates *if intestate*. But Voet does not think this opinion can be sustained even on pure principles of Roman law. Nothing more can be proved from the laws cited than that a marriage *depræsentis* can be celebrated by consent alone and without solemnity, and therefore supposing the present consent in the marriage, the offspring would be legitimate. But it cannot at all be inferred that the betrothed would become a wife merely by the intervening concubinage, or that spousals would make marriage by concubinage, so that the child would be considered as legitimate, as one born from a man and his wife in the sense in which it is said that marriage demonstrates the father. For according to the laws of Holland and Ultrajectina, and elsewhere, three banns on market days or church days are necessary for the validity of a marriage, and the solemn celebration of the marriage in the church or before the authorities; and without this is done the marriage is by the provincial laws declared *ipso jure* null, so that there is no husband, no wife, and no lawful children.
11. If the spouses were divorced and peacefully re-united, the bond of marriage being revived, on the principles of the Roman law the child then conceived and born was considered legitimate, as born from a husband and his wife. Consent only was the original cause of the marriage, and the divorce being removed there is a revival of that consent. This is our law, too, whenever the spouses voluntarily separated without any judicial sentence being interposed, and afterwards, through the intercession of friends, returned to their former position. But if the marriage were dissolved, after a judicial hearing of cause by the decree of the judge, the law of Holland is different. For by the edict of the States-General those marriages are *ipso jure* null which are contracted without the solemnity of banns. On the renewal of a marriage once dissolved by public authority, the same necessity for banns exists. Therefore only if the solemnity of banns be observed can children then born be considered lawful; for that children can be lawfully born without marriage is absurd. Van Leeuwen is very much mistaken in his *Censura Forensis*, where he says that the mere penitence of separated spouses, and their concord, suffice for a revival of the dissolved marriage, on which ground, as he thinks, the children born would be lawful. The bond of marriage can be equally broken by divorce or death. Nor can it be doubted that a true divorce has taken place when there is an intention to have a perpetual dissension; and what sane man will deny that he who, not content with a private separation, sought

a judicial separation, showed the persistence of his intention, unless it appear to have been done in the heat of anger.

13. The author refers to authorities for finding out whether a child is legitimate or illegitimate.
14. Those are to be considered children which, having the usual form, have more or less than the ordinary number of human members; but not when a woman gives birth to a monster contrary to the human form. Such are not to be educated, but rather suffocated by the public authority, says Seneca; and that that is the practice now-a-days there is the authority of Grotius, Groenewegen, and others.

1. There is another division of persons, by which some are their own masters, being neither under the power of a father nor of a master. They are called "fathers of a family," whether they have or have not attained the age of puberty; for even one who has not attained the age of puberty, and is still under tutelage, may be *sui juris*, *pr. instit. de tutelis* (Inst. 1. 13). Although I am aware that other and different meanings are found in use for the term *pater et materfamilias*, with approved writers: See Rævardus *libr. 4. variorum cap. 12. in med.* Others are under another's power, as those who are under the power of a master or a father. Concerning dominical power (*i.e.* over slaves), I have said enough to explain it in the preceding title. [N.B. It is now abolished.]

2. Paternal power is the right which male Roman citizens, not females, have over their children; gained by lawful marriage, or by legitimation or adoption: whether they are born free or made free. *l. libertos 8. C. de patria potestate*. (C. 8. 47.); whether they know they have offspring born to them, or not. *l. uxorem 23. ff. de manumiss. testamento*. (Dig. 40. 4.). Even if owing to madness or idiocy, or to their laboring under any other defect of mind they cannot actually exercise this power: and whether the children were conceived before their madness, or in their madness, from a sane wife, or from one troubled by a similar kind of idiocy *l. patre furioso 8. ff. h. t.* (Dig. 1. 6.) *l. qui furere 20. ff. de statu hominum*, 1. 5. For although in those things in which the effect of the paternal power is to be declared by any act or by consent given, the act of a madman father cannot be waited for, and therefore his children can adiate an inheritance and contract marriage without a command having been given by such a one *l. cum heres 52. in pr. ff. de acquir. vel omitt. hered.* (Dig. 29. 2), *l. si nepos 9. ff. de ritu nuptiarum* (Dig. 23. 2.): *l. si furiosi 25. C. de nuptiis* (5. 4.) *pr. Instit. de nuptiis* (Inst. 1. 10. 3). Still not the less on that account will the advantages flowing from such an act of the children, and accorded by law to the parent, remain even saved to the madman himself, as if he had consented; as for instance the emoluments of inheritance, and the paternal power over grandchildren born from such marriage of a son; lest otherwise to the misfortune of the unfortunate madman there be added another affliction consisting in his loss of rights. *l. furiosus 63. ff. de acquirend. vel omittend. hered.* (Dig. 29. 2). *arg. d. l. si furiosus 26 fin. C. de nuptiis* (C. 23. 2). The same law applies to prodigals in many cases: for it is so far from being the case that by the prodigality of the father the paternal power is dissolved, that the father has rather a power of emancipation given to him, which it is certain would not belong to a madman. *l. penult. § potuit 2. fine ff. de curat. furios. et aliis extra min. dand.* (Dig. 27. 10.)

3. After describing the great severity of the ancient Roman paternal power: the author says: But by the later Roman law the paternal

authority was not so extensive : and not even in correcting the errors of children was every private censure allowed to the parent : but he could either mulct with a fine, deny aliment on account of ingratitude, or exclude from an inheritance. *l. si quis. à 5. § idem iudex 11. ff. de agnosco.* (25. 3.) *et alend. liber. nov. 115. cap. 3.* or coerce those deserving punishment by a moderate castigation, so that those whom the examples of domestic worth did not urge to the decorum of life would be at least impelled by the medicine of a little correction, for, as Seneca says, *libr. 1. de irâ. cap. 5.*, castigation which is sincere, and given with reason, does not harm, but heals by the appearance of harming. But if the atrocity of the deed exceeds the limit of domestic amendment, children guilty of heinous delicts were brought before the judge. *l. un. in fin. C. de emendat. propinquo.* (C. 9 15). What has been hitherto observed is not to be referred to the mere right of the paternal power, nor does it attach to the father only, for it is according to natural reason permitted to the mother to do the same ; and they can also exercise these rights over emancipated children. What are the powers which belong to the father, only, over his children unemancipated, consisting partly in acquiring, partly in administering, partly in substituting, giving tutors, his power of consenting to, or dissenting from, sponsals or marriage, and many other things, will be found laid down laid down in their separate places. If anyone would meanwhile see these collected and joined together, let him consult the Commentators *ad tit. C. de patria potestate et ad princip. ac tot tit. Instit. de patr. potest.* provided he remembers that, according to the customs of many nations (the Frisians excepted, as they in most things adhered to the Roman law, as is testified by *Saude libr. 2. tit. 7. defin. 1 and 3*) the effects of paternal power which remained over in the later Roman law were in a great measure taken away : or if not taken away, were shared with the mother. For the father cannot sell his child in case of necessity, nor does he with us acquire usufruct of the adventitious peculium : nor make pupillary substitution with those consequences which it used to have according to Roman law, nor enjoy more than the mother does the right of substitution : in regard to marriage, too, just as the consent of the father is required, so, when there is no father it is necessary that the mother consent, up to the same age : as is more fully laid down in the *tit. de peculio, de vulgari et pupill. substit 28. 6 de nuptiis*, and elsewhere. *Vide Gudelium de jure noviss. libr. 1. cap. 13. vers quid moribus seu neu. 14. Groenewegen de legib. abrog. ad § 2. Instit. de patria potest. Paulum Voet ad princ. Inst. eod tit. num. 5. Bugnon de leg. abrogat. libr. 1. cap. 6. Lambert. Goris adversar. tract 4. § 7.* And although, according to the Roman law, grandsons born of a son still under parental power were in the power of their grandfather, so that during his life the power of the intermediate father was scarcely visible § *ult. Instit. de patria potestate* (Inst. 1 9 3), *l. patri 20 et 21. ff. ad leg. jul. de adulter., l. si nepotem 3. ff. de ritu nupt. (23 2) § 11. Instit. de adopt. 1. 11 § admonendi 7, et § illud autem 9. Inst. quib. mod. jus patr. potest. solvitur* (I. 1 12) : by our law (i.e. of Holland) the grandsons are in the power of the father only and not of the grandfather, and it is very true that not even on the death of the father are they under the power of the grandfather : for, as the son himself is now freed by marriage from the paternal power, as I have said in the following title, the laws lay down that the grandson, born from the emancipated son, follows the father and not the grandfather, *d. § 9. inf. Instit. quib. mod. jus. patr.*

pot. solvitur (1 12): and it is necessary to regard every grandson as not otherwise than conceived and born from the emancipated son, and therefore only subject to the power of the father. *Gudelinus de jure noviss. libr. 1. cap. 13. in fine. Groenewegen ad § ult. Inst. de patr. potestat. Ant. Matthæus disputat. de nuptiis et tutelis, in auctario de divortiis legum et usus num. 17.* wherefore only the consent of the father and mother, not of the grandfather or grandmother, is required for marriage: as observed in *tit. de ritu nuptiarum* (23. 2).

4. This paternal power is established chiefly in three ways, viz., by marriage, legitimation, and adoption; also by sentence of the judge, when, *l. unic. C. de ingratis* (C. 8 50), those who were emancipated on account of ingratitude were recalled into the paternal power; or were in error declared by the judge to be filii familias when they were either emancipated or not sons at all; the judgment being taken as truth, *arg. l. ingenuum 25 ff. de Statu hominum*, Dig. 15, joined to *l. si cum pater 2 C. si advers rem. judic* (C. 2 27); the fullest restitution being made by the Princeps, if, by deportation, the paternal power had vanished: § 1 *Instit. quib. mod. jus patr. potest. solvitur* (*Inst.* 1 12). The paternal power is not otherwise acquired by marriage than if the son be born in the lawful time, which is from the beginning of the seventh month to the end of the eleventh month; so that the offspring born in the seventh month after marriage or later is considered as legitimate; for that offspring can be born perfect in the beginning of the seventh month is received on the authority of Hippocrates *l. septimo 25 ff. de Statu homin.* (Dig. 1 5) *l. intest. 3) ult. ff. de suis et legit. hered.* (Dig. 38 16), also in the eighth, ninth, tenth, up to the beginning of the eleventh month, reckoning from dissolution of the marriage by the death of the husband, or divorce, or the absence of the husband: *l. Gallus 29 in pr. ff. de liberis et posthumis* (Dig. 28 2): *l. intestato 3, penult. ff. suis et legit. her.* (Dig. 38. 16) *l. ult. ff. de fideicommissar. libertat. Novell. 39, cap. 2.* Children born after the lapse of the 10th month after absence or dissolution of the marriage are not to be reckoned as legitimate, and thus cannot be considered as subject to the paternal power *d. l. intestato 3 § pen. ff. de suis et legit. hered.* (38. 16.) *Novell. 39, cap. 2.* and much less, if we take the case given by Ulpian, that the husband has been away for ten years, and returned home to find there a child a year old, *l. filium 6 ff. h. t.* (Dig. 1 6). As, however, the medical men do not agree sufficiently among themselves as to the outside longest time of carrying in the womb, *Aulus Gellius Noct. Attic. libr. 3, cap. 16, Paulus Zacchias, question, Medico legal. lib. 1, tit. 2., Carolus Hannibal Fabrotus de tempore partus humani*; and as, moved by terror and other sudden emotions of the mind, it is well known that women not unfrequently give birth sooner than the time; and as also, on the contrary, it is not improbable that the time of birth may be retarded by adverse domestic grief, infirmity of health, want of natural power, poorness of food, and other similar causes: so it is therefore not unreasonable that something should be left to the discretion of the judge; so that, weighing carefully all the circumstances, also the antecedent life of the woman herself, her morals whether pure or suspected by public report, and also consulting those skilled in the medical art,—the judge may somewhat recede from the prescribed ten months given by the limit of the Roman law, more especially as laws are passed for wanted and more frequent cases, not for those which hardly and very rarely arise, *l. jura 3 et 11 et seqq. ff. de legibus* (D. 1 3); so that therefore the limit of the law cannot even be very exactly followed in

very rarely happening cases—*arg. l. si major 12 C. de legit. heredibus* (C.6.58) For which reason, public report and presumption of modesty counselling it, one born in the twelfth month has in Frisia been declared by the judgment of the Court to be legitimate and the heir to a deceased husband (father), *Sande decis. Frisic libr. 4 tit. 8, def. 10; Add Paulus Zacchias, quæst. Medico legal. libr. 1 tit. 2, quæst 6; Mynsingerus. cent. 6, observ. 40; Menochius libr. 2 de arbitrar. judic., casu 89 num. 33 et seqq. Rittershusius ad novell. part 4 cap. 13, Carranza de partu natur. et legit. cap. 13, 14, 15. Carpzovius definit. forens., part 4, constit. 27, def. 13, 14, 15. Gudelinus de jure novell. libr. 1, cap. 12, vers. "ac decemviri" seu num. 6.*

5. We need not enquire as to the paternal power in the case of one who is born in the sixth or fifth month after the marriage is contracted, or earlier, since in the opinion of the doctors it cannot be born alive nor perfect. If, however, it yet happen to be born perfect and fully formed, the husband cannot be forced to recognise it or to support it as his own, whenever he will deny on oath, if it be demanded, that he had untimely intercourse before marriage, *arg. d. l. 12 ff. de Statu homin. (Dig. 1. 5) Zacchias quæst Medico legal tom. 3 decis. 45; Carranza de partu natur. et legit., cap. 7, 8, 9.* Of course if anyone has rashly had secret intercourse with a maiden before marriage, and afterwards lawfully married her, and does not deny such previous intercourse, it is without doubt that the offspring born immediately on marriage celebrated, or even on the very day of the marriage (although it ought then only to be conceived) is to be reckoned among lawful children; the subsequent bond of marriage removing all stain of the conception, *arg. princ. Instit. de ingenuis (Inst. 1. 4) l. et servorum 5 § 2 ff. de statu hominum (1 5), for even children born before marriage can afterwards be thereby legitimated, § ult. Inst. de nuptiis (1. 10) Simon van Leeuwen censur. for. part 1 libr. 1, cap. 3 num. 5; even if after the marriage there has been no further intercourse, and even if we reside in those places where, in order to secure the other consequences of marriage, admission to the nuptial couch is necessary besides the sacerdotal blessing.*

6. In the case of one born from a wife in the lawful time, the presumption is in his favour that he is legitimate, and such as the law declares one to be who is born from husband and wife, *l. filium 6 ff. h. t. (Dig. 1. 6) l. si vicinis 9 l. de nuptiis (C. 5. 4); and that "he is the father whom the marriage points out," l. quia semper 5 ff. de in jus voc. (Dig. 2. 4).* And in order to prove that anyone is a legitimate child it is sufficient to show that it is born from a lawfully celebrated marriage; so that, where there is a doubt, both the capacity to generate is presumed, and the exercise of intercourse between spouses living together. Nor is it to be tolerated that one who daily lives with his wife should refuse to recognise a child born from her to be his: unless it is agreed that the husband for some time did not have intercourse with his wife, on account of intervening infirmity, or impotence to generate. This being alleged and proved, a child born in his house, although the neighbours know it, is not, on account of this manifest reason, to be considered the husband's child; *d. l. filium 6 ff. h. t. (Dig. 1. 6), Hugo Grotius manuduct. ad Jurisprud. Holland libr. 1, cap. 12, num. 3, Christinæus ad Leg. Mechliniens. tit. 18 art. 4 n. 1. Andr. Gayl libr. 2 obs. 97 n. 16. Menochius de arbitrar. judic. libr. 2 casu 89 num. 19 &*

53 ac seqq. *Jacob Coren consil.* 12, num. 11 et seqq. *Abr. à Wesel ad novell. constit. Ultraj. art.* 14 num. 55.

7. What then if a woman gives birth during that time in which she could be pregnant by her husband, say in the eighth month or the ninth month from the contracting of the marriage, and denies that her husband is the father, whether she does so before the birth or in the very difficulties and moment of childbirth, and admits that she had conceived it by another: will the offspring not be lawful and the offspring of the husband? Certainly, if there is no other proof that the offspring is born from another than the husband beyond this very confession of the wife herself, it is more correct to say so, and that the woman should not injure herself by such a declaration, even if it were a sworn one, and thereby become guilty of adultery or whoredom, or be rejected by being repudiated. Nor should the offspring thus be injured thereby: he must be considered legitimate and acknowledged by the husband, even unwilling and denying his child without lawful proofs, must be supported, and be blessed with the inheritance at the proper time. For not only is whoever is born in the house of the husband to be presumed as conceived from him and his wife, so that, when the mother is naturally certain, he shall be considered the father by presumption whom the marriage points to, unless there be clear evidence to the contrary, *d. l. filium* 6 ff. *h. t.* (Dig. 1. 6), *l. quia semper* 5 ff. *de in jus voc.* (D. 2. 4), but you may in addition rightly conjecture that such a profession of her own baseness, thus voluntarily made, has sprung from a certain insane and wounded imagination, or from a hatred or anger conceived towards her husband, which is in itself a brief madness. *Scævola* says that assertions concerning offspring, proceeding from a woman who is angry on account of repudiation or any other cause, are not to be taken as proof, but only giving room for proof: *l. Imperatores* 29 § 1 ff. *de probatione* (Dig. 22. 3) *arg. l. divorcium* 3 ff. *de divorciis* (Dig. 24. 2) *l. quicquid* 48 ff. *de reg. juris* Dig. 50 17. If no signs of a great anger appear, the law considers such assertions, in a doubtful case, to be false, and as proceeding from those who are not of sound mind, and as containing a malignant feeling of parents towards children, until the truth of the assertions shall otherwise appear, *l. non est* 4 ff. *de inoff. testam.* (Dig. 5. 2), *pr. Inst. eod. tit.* 2 18: *nov.* 115, cap. 3. For not by bare asseverations and lying profession, even though either spouse consent, can prejudice be done to truth and to the children, *arg. l. non nudis* 14 *U. de probatione* (C. 4. 19); *l. nec omissa* 15, *l. parentes* 22 *C. de liber. causâ.* (C. 7. 16) *Jacob. Coren consil.* 12, *Marsardus de probatione, Concl.* 789, *Boerius decis.* 299, *Christinaeus ad Leg., Mechliniens tit.* 18, art. 4, num. 2, et seqq., *Costalius ad l.* 6 ff. *h. t.* (Dig. 1. 6), *Andr. Guyl, libr.* 2, obs. 97, num. 8; *Ant. Matthæus de probat. cap.* 1, num. 50, et seqq.

8. If there be not only the assertion of the mother, according to what has been already said, but if we suppose her convicted of adultery, not even then indeed must we presume that the offspring is adulterous; but rather, if there be a doubt that it is born from the husband, if he, during that time in which the offspring could be conceived, cohabited with his wife, if he were not hindered by any manifest impotence, whether it is declared to be the offspring of the husband or whether it is said to have the face of an adulterer. For the crime of adultery which is brought against the mother cannot prejudice the infant, for it is possible that she may be an adulteress and yet that the child born from her may have had the husband as its father, *l. miles*

11 § *quæ propter* 9 ff. *ad leg. Jul. de adulter.* For how if the adulteress imitated Julia, and only admitted the passenger when the ship was full, so that in this way she should produce children resembling her husband in face and appearance? It will help also if we remember that where the beginning of a thing can both be derived from a lawful and from a base act, where there is a doubt we must presume in favour of the lawful act and of morality. *Menochius libr. 2 de arbitrar. jud. casu* 89 n. 20, *et seqq. Andr. Gayl, libr. 2 obs.* 97 num. 7.

9. The case will not be without difficulty if the wife, neglecting the year of mourning, and re-marrying in a short time after the death of her husband, gives birth to a child in that time in which she could have conceived either from the first husband, who is dead, or from the second husband; say in the ninth month from the death of her husband, and in the seventh month from contracting the second marriage. There are those who think that the child must be considered the child of both husbands, must be supported from the patrimony of both, and admitted to the inheritance of both. There are others who leave it to the child to choose whether it wishes to be considered the child of the dead man or of the living. But as the former opinion involves an impossibility, and as it would be ridiculous, and repugnant to nature, that any one should have this or that father at his own pleasure, it has seemed fit to others that such offspring should, on account of the uncertainty, be reckoned among the children of neither husband, and rejected from the inheritance of both, *arg. l. si fuerit* 10 ff. *de reb. dub.* (Dig. 34. 5), *l. si quis ita* 3 § *si duobus* 7 ff. *de adim vel transfer. legat.* (Dig. 34. 4); as it was not the right that was wanting, but its proof, *l. duo sunt* 30 ff. *de testam. tutelâ* (Dig. 26. 26), *Baldus ad l. liberorum*, 11 § 1 ff. *de his qui not. infam.* (Dig. 3. 2). But this cannot either rightly be admitted: for it ought to be adjudged not only hard but full of iniquity that one who is born from a union not disapproved by law, and therefore born in lawful marriage, should be reckoned in the rank of illegitimate children, and, without any fault of his own, despoiled of his paternal inheritance, which natural reason, as it were the tacit law of nature, has awarded to children. For although the law visits these hurried marriages with penalties, it yet does not declare them invalid or unlawful or null; resting satisfied with the penalties themselves: just as it treats second marriages, although they are fettered with various restrictions. Nor is the opinion of those any better who think that we should ascertain from the face and lineaments of the offspring whether it more resemble the deceased father or the surviving mother, whose child it is, and thus to be considered. For nature often forms the offspring in resemblance to the parents, *Tyraquellus leg. Connubial* 7 gloss. 1 part 7, n. 52. *Henricus Salmuth ad Pancirolli rerum memorabil. part 2, tit. 10, pag. 206 et seqq.*: still how fallacious is this foundation, for how frequently are children born dissimilar to their parents in form, in strength, in intellect, in manners; or more assimilated by nature to the mother or to strangers than to the father. Experience shows this, and it is clearly proved by *Tyraquellas lege Connubial* 14; num. 154, *Salmuth ad Pancirolli memorabilia d. tit. 10, pag. 204 205.* It is more probable, therefore, and seems more consonant to the analogy of law, that the offspring shall be put down to the second husband: not only in that case where the first husband, long fatigued and broken up by the illness from which

he died, may be presumed to have abstained from his wife; but even in that case where, removed by sudden fate, we may assume that a short time before he died he may not have busied himself with the creation of children. For, as we have above stated, offspring can be born perfect in the seventh month, and he is presumed to be a lawful child who is born from a father cohabiting with a mother, and that mother; so that, unless there is an evident defect of generating powers, it is not to be tolerated that one should deny that a child born in his house is not born from him, if he have not any lawful remedy by which he can repel the presumption born against him, *d. l. filium* 6 ff. *h. t.* (Dig. 1. 6.). Further he owes it to his own rashness that, contrary to the prohibition of the law, he married a wife too early, and before it was certain whether a posthumous child could be expected from the former husband or not: for the laws require that he who contracts with another ought not to be ignorant of that other's condition, *l. qui cum alio* 19 ff. *de reg. juris* (Dig. 50 17.) And again it is better that he should be forced to support and make as his heir an offspring perhaps not his own, who himself is the author and the cause of the uncertainty, and by his premature marriage has caused confusion of blood and of seed, rather than that the deceased should be burdened with such a weight as recognising one who is not his own, he being beyond all fault of the confusion. The second husband has to impute it to himself that he willingly got into these difficulties, which, if he had followed the precepts of the law, he could have avoided, *arg. l. non exigimus* 2 § *si quis tamen* 8 ff. *si quis caution. in judic. sist. caus. factis* (Dig. 2 11) *Treutlerus* vol. 1, disp. 2, th. 5. lit. F: vide *Tyrraquellus lege connubiali* 7, num. 52.

10. But whoever is born from one who is betrothed and then impregnated, and perchance the betrothed man dies before he has given his consent *de præsenti*, where the marriage was according to the Roman law, or between the proclamation of banns as required in this country, or before the solemn contracting of marriage in church, or according to the law of the place,—cannot by any means be accounted legitimate. For although he is not regarded as a contemner of the laws who, prevented by death, could not satisfy the necessary solemnities, and consent alone makes marriage, although not confirmed by intercourse, *l. nuptias* 40 ff. *de reg. juris* (Dig. 50 17): as, moreover, in the union of a free woman marriage is to be presumed where there is a doubt, *l. in liberæ* 23 ff. *de rit. nuptiarum* (Dig. 23 2); and although therefore the marriage is not considered wanting in strength on account of the omitted pomp, or any other nuptial ceremony, *l. si donatione* 22 C. *de nuptiis* (C. 5. 4); and although moved by these reasons many writers declare such a marriage to be, if not in all respects lawful, at least to be regarded in the place of a lawful marriage, and the child a successor, *ab intestato*, to his father and agnates. *Mævius ad jus Lubecens.* part 2, tit. 2, art. 9 num. 56, *Hartmannus Pistor. observat.* 83. *Sande decis.* *Frisc.* lib. 2, tit. 1, def. 1. *Mascardus de probation. conclus.* 1032. *Carpzovius defin. for.*, part 3, constit. 14, defin. 12: yet you cannot rightly sustain this view from the fundamental principles of the Roman law itself. Nor from the laws cited can you prove more than that on a mere consent *de præsenti* marriage can be celebrated without solemnities; and thus that, presupposing a present consent to the marriage, the offspring would be the legal offspring of the father. But you cannot at all argue from this that one who is betrothed is

made a wife by the mere intervening intercourse, or that by intercourse spousals become marriage (which is, however, what is to be proved), so that the child shall be considered as lawful as if born from a man and his wife, in the sense that the marriage shows the father, according to *l. quia semper* 5 ff. *de in jus voc.* (Dig. 2. 4) *l. filium* 6 ff. *h. t.* (Dig. 1. 6) It is far more consonant to the laws of Holland and Ultrajectina, and other countries with whom three proclamations on market days or in the church are necessary to the validity of marriages, and also the solemn celebration of the marriage in the church or before the civil authorities, that without these formalities marriages are declared by the provincial laws to be *ipso jure* null, as more fully laid down in the *tit. de ritu nuptiarum* (post. 23, 2), and therefore that there can be neither husband, wife, nor lawful children, *arg. § pen. Inst. de nupt.* (Inst. 1. 10) *Sande decis. Frisic. libr. 2 tit. 1, def. 1 à med. usque ad fin.* Abr. à Wesel *ad novell. constit. Ultrajectin. art. 14, num. 56.* *Simon van Leeuwen Cens. For. part 1, libr. 1, cap. 3 num. 6.* *Paulus Voet ad § 12 Inst. de Nuptiis, num. 2.* If, however, it is clear that those who did not observe the solemnities of marriage yet wished to contract marriage, and that the municipal laws do not invalidate such marriages, contracted without the forms prescribed by law, but rest content with other penalties, he will not err who, following the reasonings of the first-named opinion above stated, considers the offspring in such case to be lawful.

11. If there has been a divorce in any way between spouses, and then, harmony being restored, they have re-linked the tie of marriage, offspring thereafter conceived and born ought, according to the fundamental principles of the Roman law, to be considered lawful, as being born from a husband and his wife, *arg. d. l. 5 ff. de in jus voc.* (Dig. 2. 4.) *d. l. 6 ff. h. t.* (Dig. 1. 6.); for as marriage is in the beginning contracted by consent merely, so it is reasonable that when it is broken by divorce, it can be renewed by mere consent, *arg. novell. 134, cap. 10: l. plerique* 33, *l. generali* 34 § 1 ff. *de ritu nuptiar.* (Dig. 23. 2.) Which is also rightly taken to be according to our customs (*i. e.*, the law of Holland), whenever the spouses have mutually left each other from their own free will, without the interposition of any judicial sentence; and where afterwards, by the intervention of friends, they have returned to each other's favour and embraces. But if you take the case where the marriage has been dissolved by the decree of the judge, and after judicial cognizance of the causes, it must be declared that a differing law obtains in Holland. For it was enacted by the Edict of the Counts that no marriages are *ipso jure* null which are contracted without solemn proclamation of banns, according to the Political Edict of 1580, art. 3 and 13; and in renewing marriages once dissolved by public authority, the same reason of proclamation is of force, namely, lest fraud be done to another; and that anyone may proceed to a renewal who can show that matrimonial faith has been pledged to him by an innocent person, that he is able to re-marry, and perhaps that such faith is strengthened by a premature intercourse. The consequence is that unless these requisites have been observed lawful children cannot be born from such marriages. For that lawful children should be born without marriage (and marriages renewed without lawful form are no marriages) is absurd. *Groenewegen ad l. 7 C. de nuptiis* (C. 5. 4.) *Brouwer de jure connubiorum libr. 2, cap. 18, num. 11 in fine.* And Simon van Leeuwen is very greatly mistaken

when he thinks in his *Censura*, part 1, libr. 1, cap. 3, num. 12, in med., that the bare penitence, will, and return into concord of spouses separated, is sufficient to re-integrate a dissolved marriage, and that therefore children born from such marriage would be lawful. As if it were not a new marriage, but the same marriage continued, or that, repentance having intervened, there cannot be said to have been a real divorce, according to *l. 3 et 7 ff. de divortiis* (Dig. 24 2), *l. 33 ff. de ritu nupt.* (Dig. 23 2.) For that marriage is broken equally by divorce as by natural death appears from *l. 1 ff. de divortiis* (Dig. 24 2), nor can it be doubted that a real divorce has taken place when it was made with the intention of establishing a perpetual dissension, *l. divortium 3 ff. de divortiis* (Dig. 24 2) And who, I pray, that is in his right mind, will deny that this is the intention of him who is not content with a private secession, but clearly declares the perseverance of his mind by obtaining a judicial sentence; unless it appear that what has been done proceeds from the heat of anger, *d. l. 3*, added to which is the fact that in *l. si pœnituit, 7 ff. de divortiis* (Dig. 24 2) it is said that only then does a marriage continue on account of penitence, if the penitence have come before the summons of repudiation has been issued, or if, after repentance, the order has been given in error: so that after the summons has been seriously issued, and much more after a sentence of separation, there cannot be otherwise than a full severance of the marriage.

12. By what other modes it is proved, and from what other presumptions it is gathered, that anyone is either simply a son, or a legitimate son, you will see more fully from Mascardus de probationibus conclus. 787 et seqq. ad conclus. 801 Menochius de arbitrar. judic. libr. 2, cas. 89, et de presumpt. libr. 6, presumpt. 53 54. Andr. Gayl. libr. 2, obs. 97. Salmuthus in notis ad Pancirolli memorabilium. libr. 2, tit. 10, pag. 204 et seqq. Pontanum de alimentis, cap. 3.

13. This is agreed that they are to be reckoned among lawful offspring in whom, having the human form, nature has diminished or increased the number and duties of the human members; but not those whom a mother has given birth to against the form of the human species, monsters and prodigies, *l. non sunt 14 ff. de statu homin.* (Dig. 1 5) *l. quod certatum 3 in fin. C. de posthum. hered. inst. t. (C. 6 29)* *l. quod dicitur, 12 § 1 ff., de liberis et posthum.* (Dig. 28 2) Such were therefore not to be reared, but rather suffocated by public authority. "We extinguish monstrous offspring," says Seneca *l. br. 1, de ira cap. 15*, "and we also drown children if weak and monsters. It is not anger, but reason, to separate the useless from the sound." And that this is wont to be done now-a-days, witness, besides Grotius, Gomezius, and others, Groenewegen *ad d. l. 14 ff. de statu homin. Ant. Matthæus de criminibus lib. 48, tit. 3, cap. 1, num. 6* Gohefredus in notis *ad d. l. quæret aliquis 135 ff. de verb. signif.* (Dig. 50 16) Although the birth of even such prodigious offspring anciently benefited the mother, so as to enable her to say that she had given birth, and thus to escape loss, *d. l. quæret aliquis 135 ff. de verb. signif.* (Dig. 50 16) It was otherwise, however, if she sought to seek for gain; in which sense must be received what we read with Paulus 4, *sentent. recept. tit. 9 § 3*.

TITLE VII.

OF ADOPTION, EMANCIPATION, AND OTHER WAYS IN WHICH PATERNAL POWER IS DISSOLVED.

SUMMARY.

1. Adoption introduced among the Romans, as with other nations, to provide in case of sterility and death in families, and as a solace to those without children. Defined: a legal ceremonial act by which one who is not a son by nature becomes a son, or by which we adopt as sons and grandsons those who are not so.
2. *Adoptio plena* and *minus plena*.
3. Abrogation—how anciently made: what is required that one below puberty be rightly abrogated.
4. The Antoninian fourth described. It was not the legitimate, but a fourth of all the goods.
5. Adoption in specie; what it is; and when made by testament.
6. What are the common requisites of adoption and adrogation, and what their common effects.
7. But neither by our laws nor by the laws of many other nations is adoption any longer in practice, nor, if had recourse to, are adopted children considered as children, but more as alumni, and even if they have been specially adopted they cannot enjoy the right of children. Thus they cannot succeed *ab intestato* to their adoptive father, nor come under the name of children, whether the mention of them is found in municipal laws or last wills: except in Frisia, that most religious custodian of the Roman law, where adoption, unabrogated, still flourishes, and brings with it the right of succession *ab intestato*.
8. In Germany, instead of adoption, there was a *unio prolium*: described.
9. The paternal power is dissolved by the natural death of the father or child. Also by the *Capitis diminutio*. But not by banishment from the country.
10. It was also lost by the Roman law, by elevation to a patrician dignity; also by the Roman-Dutch.
11. Also by emancipation, under solemnities, especially in Justinian's time, by the mere authority of the magistrate; which mode of emancipation is not wholly unknown now-a-days. It allowed a father to declare before the magistrate that he frees his son, who is present, from the paternal power and the paternal bonds, and requests the magistrate to declare him *sui juris* and enter it on the record.
12. It is doubted whether there can be also a tacit emancipation when the wish to emancipate is manifested by the thing itself and by deeds, as if the son with the father's consent lived away from him, carries on trade, does his own business, and founds a family. Voet thinks it certain that if this is done where the father is ignorant of it, or absent or unwilling, the paternal power is not dissolved. For if one lend money to another as to a *paterfamilias* not deceived thereto by mere simplicity, but because the borrower seemed to the public to be a *paterfamilias*, and acted and contracted as such, and filled public offices, the exception founded on the *Senatus Consultum Macedonianum* cannot be opposed to him, says Ulpian, but yet he is supposed to be emancipated from the bonds of the paternal power. Hence, where the father or son is relegated, and it was clear that the son lived separate from the father, inasmuch as this was not the effect of consent, but of a sentence of condemnation, the paternal power over

him remains unshaken. Much more so if the father made declaration that he is unwilling that the son should depart from him, or that the paternal power should be broken on that ground. But if the father know and connive, and consent, it would be more fairly assumed, in case of doubt, that the paternal power is not dissolved. By our laws, and the laws of other countries, the paternal power is dissolved by the residence of the son away from the father for a year and a day, if it is clear that the son do not go away only to study or to travel.

13. The paternal power is not removed by the madness of the father, nor by military service of son, whether armed, or gowned, as when the son is inscribed in the rank of advocates. Nor by the nuptials of son or daughter.
14. If the marriage tie ceased before the surviving spouse has attained majority, many think that the paternal power is renewed, especially over a widow, because she has never been made *sui juris* by marriage or declared fit to defend herself and her goods, but had merely commenced to be under another person than he to whom she was formerly subject. Being now deprived of that natural protector, it seemed consonant to natural reason that she should return into the power of her father, if not father *qua* father, then *qua* tutor, and be governed by his authority, as being still of such an age that she could not sufficiently conduct herself or her business. Certain authors cited by Sande are of that opinion. But it seems more fair, when the Statute law is silent on that point, that the widow should not return into either the paternal or tutorial power, for both kinds of power were simultaneously extinguished in legal mode: the paternal by the marriage, the tutorial and marital power by the death of the husband, and reason dictates that what is determined by law can only be renewed in a certain way fixed by law. It would be unjust that an unwilling spouse should return into the paternal power, into which she could not return honourably, and according to the opinion of many, except by adoption; and more unjust that she should against her will, without law, return from the tutorial power, a power to which she had willingly and voluntarily submitted herself in marriage, to another not armed with equal power and affection.
15. Although neither majority nor any other attained age removed the paternal power among the Romans, for it is nowhere so found stated, not even by dignities which only were conferred on majors, and even were often granted to minors, yet the agreement of many nations is the opposite, for almost everywhere both the tutorial and paternal power cease on majority and the completion of the 25th year, unless the local laws in some places require certain other special requisites.

1 to 6. The author here describes the old law as to adoption. This, as appears from the next §, being now obsolete, it is considered unnecessary to translate these sections. Their short contents will be sufficiently gathered from the summary at the head of this title.

7. But more than enough has now been said as to this mode of introducing the paternal power. For neither with us, nor according to the customs of most other nations, is adoption any longer found resorted to. Nor, if it should actually take place, are those who are adopted now-a-days regarded in the place of children, but rather as foster children or pupils (alumni), although they were intended to be so adopted that they should rejoice in the right of children. Whence they neither succeed *ab intestato* to their adoptive father, nor come under the appellation of children, whether this name of "children" is found inserted in privileges, or municipal laws, or in last wills: especially as the

Romans even did not wish that they should be classed under the appellation of children if there was a question as to being excused from tutelage, or from any other public duties, on account of the number of children, or the existence of a condition *si sine liberis*, or avoiding the penalties of being childless, *pr. Inst. de excus. tutor.* 1. 25. *l. fidei com. 76 ff de condit. et demonstrat* (Dig. 35 1) : *l. si ita 51 § 1 ff. de legatis 2* (Dig. 31 2), *Tacitus annal. libr. 15 cap. 19*, *Gudelinus de jure noviss. libr. 1; cap. 13, num. 15, et seqq.* *Christinæus vol. 4, decis 185, num. 4, 5*, *Anton. Mattheus paræmiâ 1, num. 14*, *Hugo Grotius. manud. libr. 1, cap. 6, num. 8*, *Imbertus Enchirid. verb. filii adoptivi. Petr. Gregor. Tholosan. synt. jur. civ. libr. 10, cap. 6, num. 30*, *Groenew. tit. Instit. de adoption. P. Voet ad § ult. Instit. de adopt. num. 3*. Except perhaps in Frisia, that most religious custodian of the Roman law, in which adoption still flourishes as unabrogated, and the right of intestate succession is accorded, as shown by a recent example in this century, given by *Huber ad Instit. h. t. num. ult.*, unless one view the succession *ab intestato* in the example there given, not as taking place by virtue of adoption, but as a succession given to the son of a brother, and therefore the nearest agnate. The argument that adoption still obtains in Frisia, because it is not abolished by statute, is shown by *Gudelinus* to be weaker. For according to that argument, not only could it be maintained that adoption obtains in many other places (where the statutes were quite as silent, and no vestige of its abrogation occurs), but in like manner the rights of servitude, of manumission, and many other acts would be weakened. That this would very greatly break in upon received custom, and the customs of nations, is clear : see *Gudelinus d. libr. 1, cap. 13, num. 15, 16, 17*.

8. In Germany a "union of offspring" (*unio prolium*) prevails in lieu of adoption, by force of which, with the consent of the guardians and others interested, and by authority of the magistrate, according to the custom received in each one's territory, the children of different magistrates succeed equally, just as if they were all born from one and the same marriage. *Rickius de unione prolium, Guil libr. 2, observ. 125*, *Justus Meyerus colleg. Argentoratensi ad tit. de adoption. num. 67 et seqq.*, *Besoldus delibatis jur. ad Pandect. libr. 1, quæst. num. 66*. And that this *unio*, although not much used among us, is still not wholly unknown or forbidden, see *D. Someren de jure novercar. sect. 3, cap. 1, num. 2*.

9. The paternal power is dissolved by the natural death of father or son, or by the greatest or middle form of *capitis deminutio*, *pr. et § 1. 3, Instit. quib. modis jus patr. potest. solv.*, (*Instit. 1. 12*), but not by relegation § 2, *Instit. eod. tit. l. relegati 4 ff. de interd. et relegatis* (Dig. 48. 22.) The consequence of this is that nor do those "banished" by us, as it is commonly termed, lose or get removed from paternal power; since to such as these the consequences of deportation are not to be applied, but rather of Roman relegation, the custom and law of deportation having ceased with us—*Tuldenus tit. Cod. de bonis proscriptor. Carpzovius pract. criminali part 3, quæst. 130, num. 13, 14, 52, 53*, *Schneidewinus ad § cum autem 1. Instit. quib. mod. jus patr. pot. solvitur, num. 11 et seqq.* (*Instit. 1. 12.*), *Rodenburch de jure conjugum, tit. 3, cap. 1, num. 16 in med.* *Groenewegen ad tit. ff. de interd. et relegatis*. Still some say that those who are banished are in Germany put on the same footing as those deported, *Guil libr. 2, de pace publicâ, cap. 12*,

num. 1 et seqq. *Schneidevinus d. loco*, just as *Rodenburch d. loco* says is the case in Gaul. Nor do I think that this is opposed to our law in the case of those banished for contumacy and threatened with death, whom we call *Woestballingen*: according to the reasons given by *Groenewegen ad l. 17 ff. de penis, Ant. Matthæus de criminibus libr. 48, tit. 20, cap. 3, num. 4, 5*.

10. In this § the author states how the paternal power was lost by elevation to dignities among the Romans; and shows that by the Roman-Dutch law this is still more so, both in magisterial offices and likewise in the case of ecclesiastical dignities and priestly offices.

11. By emancipation, also, children who are willing can be released from the paternal rule and power by parents who also voluntarily do so; not those who are unwilling. In the ancient law certain formal solemnities were used: see *Brissonius antiquit. libr. 1, cap. 11, Reverendus ad leg. 12 tab. cap. 3 in fine*. In the later law, by rescript of the Emperor, according to the Constitution of Anastasius. And by the latest law, according to Justinian's rescript, by the more authority of the magistrate, § 6, et seqq. *Inst. quib. mod. jus patr. pot. solvit* (*Inst. 1. 12.*): *l. pen. et ult. et tot. tit. C. de emancipat liberorum.* (C. 8. 41.) This mode of emancipation is not now-a-days wholly unknown: for a father can declare, before a magistrate having a mixed authority, that he absolves his son, who is present, from paternal power; and asks the judge to declare him his own master, and to enter it on the records. *Imbertus enchiridio Jur. Gallici, verbis "Gallorum filii an in patrum sint potestate," circa fin.*; *Hugo Grotius manuduct. ad Jurisp. Holl. lib 1 cap. 6, num. 10, Desselius in notis ad Zoerium tit. Instit. quib. mod. patr. potest. solvit, num. 11, circa med.*

12. Whether there can be a tacit emancipation, that is, that the wish to emancipate can be declared by things and deeds: as if the son, the father consenting, dwell away from him; if he carry on business; if he conducts his own affairs, or founds a family: this is doubtful. I think it clear that the paternal power is not dissolved if the father is unaware or absent or unwilling that these things should occur. For although one has lent money to another as to the father of a family, not deceived into doing so by pure simplicity, but because he publicly appeared to many to be a father of a family, acted as such, contracted as such, filled positions as such, he cannot, indeed, be repelled by the exception founded on the *Sctum. Macedonianum* Ulpian has laid down; but still Ulpian supposed such a one to remain bound by the ties of the paternal power, *l. si quis 3 ff. ad Senatus. Macedon.* and this although if, the father or son being relegated, the son should openly live away from the father; because this has not happened by consent, but by the necessary consequence of the sentence of condemnation, and the paternal power remains nevertheless unshaken, *l. relegati 4 ff. de interd. et legat. § 2* (*Dig. 48. 22*), *Inst. quid. mod. jus patr. pot. solvitur* (*Inst. 1. 12.*) And much more if the father made declaration that he was unwilling that his child should live separately, or that by so doing his paternal power should be dissolved. *Argentæus ad consuet. Brit. art. 500 gloss. 2*. But if the father connive and consent, it is more correct to say that the paternal power should, in case of doubt, be considered dissolved by such tolerance, *arg. l. 1, C de patriâ potestate*: (C. 8. 47); *novell. Leonis 25 in fine*, and I think Ulpian referred to this in *l. ait. prætor 2 § 1 ff. quod cum eo qui in alien. potest.* (*Dig. 14. 5*) *et l. 1 § alienatio 4 ff. quando de pecul. act annalis est* (*Dig. 15. 2*), for

in both instances he has put the case in which, the father being alive, the son without emancipation has ceased to be in the power of the father; and notwithstanding the rescript of the Emperor in *l. non. nudo* 3 *C. de emancip. liberor* (C. 8. 49) where it is declared that children are freed from the paternal power not by bare consent, but by solemn act or cause. Nor ought we to exclude from such acts the desire of dissolving this power, declared by facts, which is not a bare desire. Unless anyone would on the same ground contend that even by the cutting or burning the tablets of a testament, wilfully done, a testament is not weakened, which is contrary to the most known fundamental principles of our law. It might equally be laid down that by bare will or an unsolemn revocation, or the continuous lapse of 10 years, a last will made before the authorities, or before three witnesses, is not rendered void, § *pen. inst. quib. mod. test. infirm.* (I. 2 17) *l. Sancimus* 27 *C. de testamentis* (C. 6. 27). Nor, similarly, is there anything opposed to this that in § *si filiusfam.* 2 *Inst. de oblig. quæ ex quasi ex delicto* (I. 4. 5) a son living away from his father is supposed still to be bound by the paternal power, since it is enquired whether his father is bound by the action *depeculio* which would be a useless investigation if the rights of a father as to his son ceased by living apart. For in that passage there appears nothing as to the father's consent to such separation of his son, nor any circumstance in the text which would show us that Justinian forbade our taking into consideration that the separate living away of the son was only a short and temporary one, for the sake of studies, or of carrying on merchandize, or of learning an art. For which reason, both by our own customs and by the customs of other nations, when the son thus lives separate from the father for a continuous time of a year and a day, the paternal power is considered as taken away, unless it is manifest that the son has been absent for study or to travel. *Christinaeus, vol. 4 decis* 186, num. 11. *Hugo Grotius manudact. ad Jurisprud. Holl. libr. 1, cap. 6, num. 11. Imbertus Enchirid. Jur. Gallici d. verbis Gallorum filii an in patrum sint potestate, Perexius tit. Cod. ad Senatusc. Maced. num. 15 in fine, Groenewegen ad l. 3 C. de emancip. liberorum, Berlichins part 2, conclusion. practicab. 11 num. 23 et seqq., Paulus Voet ad § ult. Instit. quib. mod. patr. potestas solvitur num. 3 and 4; Abr. à Wesel ad novell. constit. Ultraject. art. 13, num. 21. That, however, it has been otherwise decided in Frisia, Sande shows, libr. 2, tit. 7, def. 6. Aalde et tit. de ritu nupt, num. 11 (post. 23. 2.)*

13. Nor is this paternal power lost by madness, *l. patre* 8 ff. *de his qui sui vel alieni juris* (Dig. 1. 6), *l. qui furere* 20 ff. *de statu homin.* (Dig. 1. 5); and as I have already said, *tit. de his qui sui vel alieni juris (ante)*, nor by simple military or armed service, nor by being "gowned," when one is inscribed in the rank of advocates, as the nature of *peculium castrense* or *quasi castrense* shows. *Berlichius d. part 2, conclus. 11, num. 53, Mærius ad jus Lubec. lib 1, tit. 3, num. 53, Schneidewinus ad § filiusfamilias 4 Inst. quib. mod. patr. pot. solv. num. 5, Heringius de fidejussoribus cap 7, num. 624.* Nor by the marriage of son or daughter, *l. 2, § 1, l. quantiens* 29 *l. si cum dotem* 22 § *pen. ff. soluto matrim* (Dig. 24. 3) *l. 1 § ult. ff. de liberis exhibend.* (Dig. 43. 30); *erg. § 7 et 9, Instit. quib. mod. patr. pot. 1. 12.* But in all other respects the customs nowadays of most other nations agree in respect of marriage. Whether it be the case of a wife who marries a husband, and by marriage becomes, as it were, subject to him as her tutor, and is taken away from under the power of her natural father,

seeing the paternal and tutorial power cannot rightly concur in one and the same person; or whether it is the case of a male who is a minor, and thus under paternal power, marries a wife, begins to be the father of a family, the head and chief of a new family, who could not conveniently remain subject to another power since he receives his wife, and the children he hopes for, under his power. This was not, I admit, so, according to the principles of the Roman law. Nor does it matter whether during the marriage he lives with his father, together with his wife and children, and is supported by him, or not, unless the statutes specially require that there shall be a separate residence anywhere, as Imbertus witnesses concerning the Pictones, in a passage to be presently cited. This general rule even the Frisians stipulate, although they are otherwise among the most sacred custodians of the Roman law. So much then to show how heavy and onerous is the power of parents over their children: by example of the dissolution which comes by promotion to dignities. The consequence is that wherever the usufruct of the adventitious goods of children used to be taken by the father, it is lost to him as soon as the paternal power ceases. *Sande decis. Frisic libr. 2 tit. 7, defin. 5, Argentoræ ad consuetud. Britann. art. 499, gloss. 2, Hugo Grotius manu duct, libr. 1 cap. 6 num. 9. Lambert. Goris adversar. tract 4 § 8. Christinaeus vol. 4 decis. 185 num. 7. Gudelinus de jure noviss. libr. 1 cap. 13 circa fin. Groenewegen ad § ult. Instit. de patriâ potestate, Imbertus enchirid. juris Gallici d. verbis Gallorum filii § post. med. Pinellus ad l. 1 C. de bonis maternis part 1 num. 34. Charondas, en ses memorables observations verbo enfans in pr., Boerius decis. 197 num. 3 et 5. Meyerus colleg. Argentorat ad Pand. h. t. num. 106 Berlichius part 2 conclus. pract. 11 num. 31 et seqq. My father Paulus Voet ad § ult. Inst. quib. mod. patr. potestas solvitur num. ult. post. med. Inst. 1. 12.)*

14. If the link of marriage be broken at such a time as the survivor has not yet attained the age laid down by the statutes as the age for dissolving the paternal power, many have thought that the paternal power over such a one revives, especially over a widow; because she had never become her own mistress by marriage, nor had been declared capable of defending herself and her goods, but had only begun to be under another person than she had formerly been subject to. Being now deprived of this protector, it appeared consonant to natural reason that she should relapse into the power of her father as such, or at all events as a legal tutor, and be ruled by his authority as long as she remains of such an age that she cannot with sufficient aptitude defend herself, or at all events not defend her own business, *arg. princ. Instit. de curatoribus § pen. Instit. de Attil. tutore (Inst. 1. 20.)* Thus think Gilkenius, Chassensæus, Ant. Thesaurus, and others cited by *Sande decis. Frisic. libr. 2 tit. 7 defin. 5 post. med. vers. restat ut moneamus Berlichius part 2 conclus. 11 num. 52*. But it is more correct that, when the statutes make no provision in that respect, a widow neither returns under paternal nor tutorial power; for both have been already ended in a lawful manner—the paternal power by the subsequent marriage, the tutorial, that is to say marital, power by the death of the husband. And what has been ended by law, reason dictates cannot be restored except in certain ways prescribed by the law. For it would be unjust that she should unwillingly, and without being required thereto by law, return into the paternal power, when, if willing, she could not honourably, and preserving her reputation among respectable

men, return into that power except by a fresh adoption, *l. ult. ff. de his qui sui vel alieni jur.* (Dig. 1. 6) *l. qui liberatus 12 ff. de adoption.* (Dig. 1. 7.) This view is assisted by the argument *l. frustra 8 C. de sententiis passis et restitutis* (C. 9 51); *l. inter stipulantium 83 § sacram. 5 vers. ne revocantur ff. de verborum obligat.* (Dig. 45. 1.) It is still more unjust that she should be unwillingly forced to receive, instead of a tutor to whom she had voluntarily and willingly submitted herself by way of marriage, another neither of equal mind nor equal power, nor armed with marital affection, *arg. l. qui 2 et 98 § aream 8 versu, nec admissum ff. de solutionibus* (Dig. 46. 3); *Christianus ad Leg. Mechliniens. tit. 9 art. 1 num. 10, Boerius decis 197 num. 4, Maevius ad Jus Inbecens libr. 1 tit. 3 num. 26, Berlichius et Sande d.d. locis: Argentraeus ad consuetud. Britann. art. 410, gloss. 1 num. 3, Brouwer de jure connubiorum lib. 1 cap. 19 num. 5, Wesel ad novell. constit. Ultraject. art. 13 num. 19, 20, Paulus Voet d. loco, Tyraquellus de legib. connubial. gloss. 3 ad verba et n'est plus en pouvoir de son père, where he refutes the arguments of Chassenæus. Compare also tit. de ritu nuptiarum, num. 17 (post. 23. 2.)*

15. Although neither majority nor any other age took away paternal power with the Romans, for that is nowhere found laid down, and can even be clearly seen from the example of dignities which were decreed to go to no other than majors, *l. 8. ff. de muner. et honoribus* (Dig. 50 4) and yet were often conferred on those under the power of others: yet the consent of many nations has, as it were, agreed to the contrary, for almost everywhere the tutorial power vanishes *ipso jure* on majority, that is, the attainment of the 25th year, so also paternal power. *Imbertus enchirid. Jur. Gallici d. verbis Gallorum filii &c., post. med.: Gudelinus de jure noviss. libr. 1 cap. 13, in fine; Christinaeus, vol. 4 decis 189, num. 9. Groenewegen ad tit. Instit. quib. mod. patr. potest. solvitur num. (3 4); unless where in some places, besides the age of majority, it is required that a distinct dwelling apart should concur, Berlichius, part 2, conclus. practicabil. 11 num. 27, Argentraeus ad consuetud. Britann. art. 500, gloss. 1; num. 1 2, where many similar Gallican laws are cited.*

TITLE VIII.

CONCERNING THE JUSTICE AND QUALITY OF THINGS.

SUMMARY.

1. As of persons, so of things, we must study certain divisions and qualities: that right may be carried out *between* persons *concerning* things. Justinian laid down that things are either common to all by the law of nations, or public, or belonging to the State, or belonging to none, or belonging to certain individuals. Thus there are two main divisions with their species—for things either belong to no one or to some one. Things belonging to none are, again, either human or divine. The former are what are common to all men. The latter are either sacred, religious, holy things,—things belonging to the public or to private individuals.
2. The author declares his intention not to enter into a prolix disputation as to the extent of the term *res publicae*.
3. Therefore, with Justinian, Voet defines things “common by the law of nations” to be those which are used by all, owned by all, and yet passing to the first occupier. They come under the power of none, as they are regarded as open to all, although everyone occupies what is sufficient for himself. Hence they pass to the first occupier, whoever he may be, for the reason that an equal share in them is given to all men by divine favor. Not, however, so that they can be wholly occupied by private persons, but only so much for everyone's share, or so much for every species of the genus. To the latter class belong wild beasts, birds, fishes, stones found in the sea, seashore, precious stones, &c. To the former class, air, running water, the sea, and seashore. Voet now treats of right of building on the seashore or on the sea. This is open to all. What is put up is private property as long as it stands. But there must be no damage done.
4. Public permission so to build is not essential; nor can anyone be stopped unless he injures another. Security against damage may be demanded. Still it is prudent to get permission, to prevent interference. As to the security exigible against damage. He who builds on public authority can only be required to give security against damage from the fault of the building; but he who builds privately, also against the fault of the soil.
5. Things “sacred” are those publicly dedicated to divine worship.
6. They cannot be dedicated to profane uses, nor alienated, except in certain cases, e. g., church debt or benefit. For modes of such alienation see tit. 11. 7.
7. “Holy” things are those protected from injury, e. g. legates: the walls and gates of cities.
8. “Things public” are in the dominion of the people as a whole, and not of anyone in particular, e. g., perennial rivers and ports: the use of these is common, as is the use of public roads, shores, banks; to sail, fish, draw and lead water, if not in public use, and if the river is not a navigable one, nor helping to make another navigable.

Whether by Roman law one could build in a public river, so as to acquire ownership in what is built, is not clear. Voet shows why. In his opinion there was a distinction, which he elaborates, between those who possessed right up to the banks and those who did not. The

- former might build in the way then described, but the latter not. It is difficult further to abridge this section, every word of which is of great weight and must be studied in the text itself.
10. Things *universitatis* are those of a corporation, e.g., of a town, village, district, body; and are not the property of individuals.
 11. Things are also corporeal or incorporeal. Former can be handled; latter not—e. g., servitude, inheritance, &c. Corporeals are, *a*, movables or which can be moved, e. g., furniture, movable storehouses, water-mills anchored, camp mills, &c.; *b*, immovables, as estates; *c*, moving themselves, e. g., animals &c.
 12. Sometimes “fungible things” are spoken of as quantities, as opposed to their own bodies.
 13. A movable, acceding to an immovable, is sometimes considered immovable, e. g., slaves of an estate, pendant fruits, metals, &c., precious stones, sand, chalk, trees in the soil, while standing, but not when down.
 14. Sometimes the legislator specially declares movables immovables. Sometimes the owner does so: as by joining movables perpetually to immovables, e. g., beams, columns, &c. These are even immovables while off the building, but intended to be replaced. Ruins of buildings intended to be re-constructed are immovables. Also movables taken to be joined to immovables, although not yet *actually* joined.
 15. Money is movable, and only in one case, i. e., that of minors, by privilege, is a decree considered necessary for alienation.
 16. Price got for immovables is not immovable, even if the intention be to buy other immovables.
 17. Refers to authorities for distinguishing movables from immovables.
 18. Incorporeal things cannot be handled, e. g., servitudes, &c. But the more common division being simply into movable and immovable, Voet goes on to consider under which of these latter heads immovables are to be classed.
 19. Thus an inheritance. It is sometimes movable, sometimes immovable, according to the nature of the things forming it.
 20. Next as to servitudes. Prædial servitudes are immovable. Usufruct and personal servitudes are movable or immovable according as they are imposed on movable or immovable things.
 21. As to “actions:” are they movables or immovables? Voet differs from those (Gayl and others) who think that actions are to be regarded as movables or immovables according as they refer to movables or immovables. He thinks that if the action is *in personam*, it is always a movable, whether it be brought for a movable or an immovable; if *in rem*, an immovable. This he proceeds to argue.
 22. As to “rents,” whether these are movable or immovable, there is a great controversy among commentators. Voet thinks a distinction must be drawn between annual rents due, or the recurring right to claim those yet to fall due. The former he views as movables, the latter as immovables. If partly due, partly not, the part due is movable.
 23. Rents, which are not annual rents specially so called, are immovables, e. g., foot passage, bridge do., gate do., emphyteutical canon, rights to mines, &c.
 24. Annual rents specifically so called are personal, if person only is charged; real if immovable is charged, and if they pass with transfer or existence of immovable.
 25. Pure real rents on estates are immovables, just as real servitudes on estates are.
 26. Mixed rents (i. e., for which person and property are both bound) are in Holland ranked by custom as movables. But where there is no special custom, and they are so imposed by will or contract as that

the capital is irrecoverable, they are more frequently classed as immovables.

27. As the practice of taking interest, secured by bond, nowadays prevails (the strictness of the canon law against interest having exploded), the right to recover the capital is, Voet thinks, a movable. The principal obligation is a movable; and an added hypothec cannot change it into an immovable. Thus wards' actions, &c., are movables, although hypothec attaches. Still such secured debts are so far like immovables that to sell or pledge the payment of the fortieth is needed.
28. Rents and debts due by a *universitas* are also movables, if there is no special statute imposing them on immovables. This is a point of controversy, however, and Voet proceeds to argue the point at length in one of his usual clear and exhaustive disputatious passages.
29. Incorporeal things are only classed under movables or immovables if a *universitas bonorum* is concerned: if not, in various cases named they are looked upon as a distinct species from movables or immovables.
30. It is very important to know whether a thing is movable or immovable, because the consequences are so different. Thus, 1, movables, wherever situate, follow the law of the owner's domicile, immovables the law of the situation. Personal actions, at all events those referring to movables, being movable, also follow the domicile of owner of action: thus Amsterdam, if Venetian owes Amsterdammer money, even if to repaid at Venice. This is Voet's view, although it is also a point of controversy, some authors whom he cites requiring the action to be at debtor's domicile. Voet admits, however, that their view is right in two cases, viz., *a*, of confiscations of a foreign debtor's goods, which can only be enforced at debtor's domicile; *b*, prescription of a personal action, for time of prescription differs in different places. 2, Immovables pass with burdens on them of certain rights which do not so affect movables. 3, *Mobilia non habent sequelam*, i. e., Movables have no following. Immovables of wards are alienated in different way to movables. Immovables are also differently transferred, hypothecated, and distrained to movables.

1. As there are divisions of persons to be considered, so are there divisions and qualities of things; in order that the law may suitably be laid down *between persons concerning things*. For Justinian says that all things are either "common" according to the *jus gentium*, or "public," or "belong to the State," or "belong to no one," or "belong to individuals," *pr. et §§ seqq. Inst. h. t. (Inst. 2. 1.)* From which it follows that there is at least a twofold division, with subordinate species: for things are said to belong either to "no one" or to "some one." Things belonging to "no one," again, are either of human or of divine right. Of human law, and belonging to no one, are those which are said to be common by the law of nations. Of divine law are either those things properly so called, as, for instance, sacred and religious things; or, by a certain analogy, as holy things. Things belonging to some one are either in the public dominion of many, or in the private dominion of individuals. In public dominion are the things of the public or of the State. In private dominion are things subject to the rule and arbitrament of individual owners.

2. I will not here enter into a prolix discussion whether public things are to be distinguished from things which are common by the law of nations; and whether those things which are common by the law of nations are commonly said to be public *re ipsæ*; so that some are taken as public by the natural law, and others, on the contrary, public by the civil law. On this head you will find everything eruditely gathered together from approved authors, by *D. Noodt probabil.*

libr. 1, c. 7 et 8. That our juriconsults, often more intent on things than on words, have often designated things by different names, even by names applied to an opposite species, no one, I think, who is not altogether a stranger to our law, can deny. The § *hoc autem 5 Instit. quib. mod. testament. infirmant.* (Inst. 2. 17) teaches us that there is a distinction which, speaking correctly, should be observed between a testament which is "ruptum" and one which is "irritum;" and yet often the juriconsults call "ruptum" what is really "irritum," and *vice versâ*, as is asserted in that same §. And who does not know that, properly speaking, "stuprum" is committed on a virgin or a widow, and "adulterium" on a married woman? Yet in the *lex Julia* these names are promiscuously and wrongly used, as Papinianus warns us in *l. inter liberas 6 § 1 ff. ad leg. Jul. de adult* (Dig. 48. 5). Nor is the law of nations less distinct from the natural law, and yet it comes under the appellation of the natural law, as appears from § 11 *Instit. de rer. div.* (Inst. 2. 1). And, to pass over other instances, Gaius has not scrupled to class "things of the State" also under public things, although properly they are different from things public, *l. in fine pr. ff. h. t.* (Dig. 1. 7), joined to *l. Eum qui 16 ff. de verbor. signif.* (Dig. 50. 16). What wonder then that things which, according to Justinian and to Marcian, are called "common," according to the law of nations, in *pr. et § 1 Inst. h. t.* (Instit. 2, 1), *et l. quedam 2 ff. h. t.* (Dig. 1, 7), and the use of which is "common" by the law of nations, *l. littora 3 § 1 ff. ne quid in loco publ. fiat* (Dig. 43, 8), are elsewhere named "public" by writers and juriconsults; and that that is called "public" which is occupied by the sea, *l. pen. ff. h. t.* (Dig. 1. 7) and that the use of the sea and its shores is called "public" by the law of nations.

3. Lest, therefore, there remain any controversy as to terms, I call, as Justinian does, things "common" by the law of nations which are at the use of all, which are the property of none, and which yet pass to the first occupier. They are reduced into the power of none, because they seem to suffice for all, although it be that each occupies as much as suffices for himself. And they pass to the first occupier, whoever he is, because all mortals obtain an equal share in them by divine liberality. Not so, however, that they can be wholly occupied by private persons, but so much for each one's part, or so much according to each species of the class. Of the latter class are wild beasts, birds, fishes, gems found in the sea or on the sea-shore, precious stones and others which, as objects of occupation, will be more fully treated *tit. de acq. rer. domin.* (post. 41. 1). Of the former class are air, running water, the sea, and the sea-shore. For which reason everyone can build on the shore and on the sea; so that not merely what is built, but even that part of the sea or shore which is occupied by the building, begins to be in the private ownership of the builder, and remains so until what is put up is destroyed: from that time the shore returns to its pristine condition. Provided he who builds takes care that he does not injure the public use, nor villas, buildings, nor monuments of private persons, erected in the neighborhood, § 1, *Instit. h. t.* (I. 2, 7) *l. quedam 2 § 1, l. nemo. 4, l. 5 § 1, l. 6 in princ. ff. h. t.* (Dig. 1, 8) *l. prætor ait 2 § adversus eum 8, l. littora 3 § 1, l. 4 ff. ne quid in loco publ. fiat* (Dig. 43, 8): *l. ergo 30 § ult. ff. de acquir. rer. domin.* (Dig. 41, 1). When such injury threatens from pirates and the like, they are kept off and impeded in the use of the shore, according to natural law. For as it is the duty of a good Præses to keep his

province quiet and peaceable by purging it of evil men, *l. praeses 3 l. congruit 13 ff. de offic. praesidis* (Dig. 1. 18), just so it was the custom of the Roman people to deny to dangerous and unruly persons driven to their shores the quiet granted to neighbours. Nor do I think that Celsus, in *l. litora 3 ff. ne quid in loc. publ. fiat* (Dig. 41, 1), wrote "that the shores over which the Roman people had rule belonged to the Roman people," in any other sense than that the Roman people exercised this kind of jurisdiction over those shores up to which the power of the Roman people was terminated by the ocean and separated from the territories of other nations: so that Celsus attributed to it the dominion of superiority, as they say, and not of property: in the same way that Antoninus arrogated to himself the dominion of the world: *l. 9. ff. de lege Rhod. de jactu* (Dig. 14, 2)

4. Nor was it absolutely necessary, in order that anyone should lawfully build on the sea or on the sea-shore, to get an order of the praetor or Princes: provided only that no one was injured. Hence the laws simply say that it is lawful, and that the buildings immediately become the property of the builder, adding, as the reason, that that which belongs to no one becomes the property of the occupier, *l. Ergo 30 § ult. ff. de acquir. rer. domin.* (Dig. 41, 1) *l. litora 3 § 1, l. 4 ff. ne quid in loco publ.* (Dig. 33, 8) § 1 *Inst. h. t.* (1, 8) So that he is said to be entitled to protection who builds on the shore, or makes a pier in the sea: nor can anyone be otherwise stopped by interdict from doing anything on a public place than if it appear that he injures another private person or the public *l. 2 § et tam 2 § ad ea igitur 5 § adversus eum 8, l. litora 3 § 1 l. 4 ff. ne quid in loco public fiat.* (Dig. 43, 8) Nor has anyone any right of prohibiting it by denouncing it as a new work (*novi operis nunciatio*) unless to compel the constructor to give him security against possible damage done, *l. 1 § quod si quis in mare 18 ff. de operis novi nunciat.* (Dig. 39, 1) Still that it is prudent to get permission to build on the seashore is certain, lest anyone should be ordered to destroy what he had built, on the ground that he had thus injured the public or a third private person, or should be forbidden to continue with a work begun, on the ground that he was building to the detriment of others: *l. quamvis 50 ff. de acquir. rer. domin.* (Dig. 41, 1) And although thus it would be true that he can lawfully build on the seashore or the sea who builds publicly, that is, on authority publicly obtained, *l. fluminum 24 in princ. ff. de damno infecto* (Dig. 39, 2); yet still he does not offend, who builds privately, that is, on private authority, *d. l. 24. vers. ad ea.* Nor is there any other difference between these two—he who builds publicly or he who builds privately on the seashore—except that he who builds publicly must give security against the fault of the work to those whose interest it is to guard against possible danger: but not against the fault of the soil. It is rather the Princeps, or ruler over a province, who on application gives permission to build on public authority, who must stop the building on such soil as is unsafe and where the building put up threatens damage to another: whereas, on the other hand, he who builds on the shore by private authority is bound to give security not only as to the work, but as to the fault of the soil: which is the sense of *d. l. 24 ff. de damno infecto* (Dig. 39, 2)

5. Among those things which belong to nobody, but on the ground of divine law, come in the first place things sacred, which are solemnly consecrated to God by the priest or by the Princeps, and therefore transferred, by public authority, from a profane to a pious use: *l. sacra*

loca 9 *pr. et* § 1 *ff. h. t.* (Dig. 1, 8) § *sacrae* 8 *Instit. h. t.* (Inst. 2, 1) *l. ult. ff. vt in possess. legat. &c.* (Dig. 36, 4) Therefore by private dedication only, it does not become sacred, *d. § 8 l. in tantum* 6 § *sacrae* 3 *ff. h. t.* (Dig. 1, 8); much less by the mere vow of a vower, *l. si quis* 2 *ff. de pollicitat.* (D. 50, 12) Such were sacred offerings, garments, vases, and the like, *l. sancimus* 21 *C. de sacro sanct. Eccles.* (C. 1, 2) and sacred buildings; when these were destroyed the ground remained sacred by the prerogative of religion, *d. § 8 d. l. 6 § 3 ff. h. t.* (Dig. 1, 8). But it is different where a cottage is placed on the shore and afterwards destroyed, the privilege of the divine worship ceasing *d. l. in tantum* 6 *pr. ff. h. t.* (Dig. 1, 8)

6. Things sacred are not to be profaned nor regularly taken away from pious uses, although they be applied to a superstitious exercise of divine worship, but should rather be converted, the error and superstition being removed, to another equally lawful worshipping of the Divine Being, *arg. l. legatum* 16 *ff. de usu et usufr. legat.* (Dig. 33, 2) And if goods acquired by one church should appear superfluous, they should be applied to the uses of a poorer church, *Consult. Ictorum Holl. part 4 Consil.* 366, 367. Still in some ways things ceased to be sacred among the Romans: as when so directed by public law, *l. inter stipulantium* 83 § *sacram* 5 *vers. nec revocantur ff. de verb oblig.* (Dig. 45, 1); or when such things were taken by the enemy, because there was not a community of sacred things among nations; some acknowledged other sacred things, another worship, and other tutelary gods: yet when recovered, what had thus been captured returned into its former consecrated state, by a sort of *postliminium*: *l. omnia loca* 5 *C. de paganis* (C. 1, 11): *l. cum loca* 36 *ff. de religiosis.* (Dig. 11, 7) Or lastly when alienated for just cause, for instance for redeeming captives, the support of paupers, paying the debt of the church, or changing one thing which is useless to the church for another thing which was more useful, *l. sancimus* 21 *et auth. praeterea C. de sacro-sanct. eccles.* (C. 1, 2) *novell 7 cap. 2 § 1.* For other causes than these it was forbidden to transfer sacred things into the catalogue of profane things. Therefore they could not either be valued, *l. sacra loca* 9 § *ult. ff. h. t.* (Dig. 1, 8) inasmuch as all things must be estimated at a price, but there cannot be a price when sale is interdicted. What is said in *l. hanc legem* 22, 23, 24 *ff. de contr. emt.* (Dig. 18, 1), that a sale of a sacred place would stand if "the place had not specially become sacred, but had acceded to the sale of a greater part," does not mean that a sacred place would be changed into a profane place; any more than that, when an estate is sold, a sepulchre in it ceases to be religious; but rather that it would, as a still sacred and religious place, by the same right and condition, accede to the place sold, and be with the subsequent purchaser what it had been with the seller. In what form and by what solemnities, necessity or evident utility urging it, it is now the custom to alienate ecclesiastical things will be elsewhere stated; and we will also speak more fully as to religious things in *tit. de religiosis. et sumpt. funer.* (post. Tit. 11, 7)

7. Holy things (which are considered of divine law, not properly speaking, but by analogy, and "in a way," as the Emperor says, and as belonging to none) are those which are protected and defended from the injuries of men: having derived their name either from *sancio*, a sanctioning decree, or *sagmen*, an inviolable vow, as may be seen in § *sacrae* 10 *Instit. de rerum divis.* (Inst. 2, 1), *l. sanctum* 8 *pr. et § 1 ff. h. t.* (Dig. 1, 8) Under this head fall legates, concerning the law as to the

non violation of whom, and the punishment of those who wrong them, whether they themselves or their train, Pomponius speaks in *l. ult ff. de legationibus* (Dig. 50. 7), and Ulpian in *l. lege Juliâ 7 ff. ad leg. Jul. de vi public.* (Dig. 48. 6) And I myself have treated above of this point in *tit. de Just. et jure* (ante p. 20. 21) To this class also belong the walls and gates of the city, not merely of Rome, but of the provincial towns, violators of them being punished with death. *l. sanctum 8 § ult., l. ult. ff. h. t.* (Dig. 1. 8) *§ sanctae 10 Instit. h. t.* (1. 2. 1): *l. desertorem 3 § nec non 17 ff. de re militari* (Dig. 49. 6.) Whether this law ought only to obtain in time of war, or also in time of peace, whether with regard to civilians only or also in towns; whether only in border towns or also in others; and other matters of this nature: I have discussed more fully in my book *de jure militari cap. 4 num. 29 et seqq. ad num. 38.*

8. With regard to public things, those, namely, which by right of ownership belong to the whole people, these are distinct from things which are common by the law of nations: because "public" things, being already occupied by the people, have begun to be in dominion: things "common" not so, but are yet to be occupied, as belonging to nobody, *l. ergo 30 § ult. ff. de acquir. rer. domin.* (Dig. 41. 1) for as Neratius says in *l. quod in littore 14 ff. de acquir. rer. domin.*, public shores are not like those things which are in the patrimony of the public, but like those things which were first produced by nature, and as yet have passed into the dominion of nobody. In these things are also included perennial rivers, and ports, *§ 2 Inst. h. t.* (2. 1.): *l. nemo 4 § 1 ff. h. t.* (Dig. 1. 8) *l. 1 § fluminum 3 ff. de fluminibus.* (Dig. 43. 12.) And as the use of these is common, just as of public roads and shores and banks, so anyone is allowed to sail and fish in them, *§ 2, 4, 5 Instit. h. t. l. 5 ff. h. t.* (Dig. 1. 8), also to draw out water, and even lead water, wherever the water is not in public use, and provided the river be not navigable, and if another river cannot be made navigable from it, *l. quo minus ff. de fluminibus* (Dig. 43. 12.)

9. Whether, however, it was by the Roman law allowed to anyone to build in a public river, so that what was built became the property of the builder, is not sufficiently clear. There are some who concede this to all armed with public authority, believing that the same rule applies to rivers as that which applies to what is built on the sea or the sea-shore. They are led to this conclusion by *l. fluminum 24 ff. de damno infecto* (Dig. 39. 2) But I rather think that a qualifying distinction should be drawn. For either the question arises as to those who possess estates near that part of the river, and therefore possess the banks; or, as to others having no right to fields and banks adjacent to rivers. With regard to the former, it is allowed them even to build, by private authority, in the river or on its bank, whatever may seem suited for defending the field or bank against the current and destroying power of the river, so that they even become owners of the work put up: provided they neither injure the upper or lower neighbours, nor those having estates in that region; and to this end they give security to do no damage in putting up the work, *l. unic. ff. de ripâ muniendâ* (Dig. 43. 15), *l. 1 § 6, 7. ff. ne quid in flumine publ. fiat quo aliter aqua fluat etc.* (Dig. 43. 13) And provided they do not obstruct the public use, so that navigation may be more difficult, or that the water will flow otherwise than it formerly flowed, *tot tit. ff. de flumin. ne quid in flum. publ. fiat quo aliter aqua fluat, etc.* (Dig. 43. 13) And because it cannot be

doubtful to anyone that when a river is covered with bridges the public use of a river is made worse for those navigating it; not even he, therefore, who has houses on both sides of a river can put up a "bridge for his own private right," *l. ult. de fluminibus* (43. 12). The juriconsult calls it a "bridge of his own private right" because it is built for the private use and advantage of these buildings: just as that is also said to be of "private right" which is in the ownership or use of a private person, *l. servitutes* 14 § *servitus* 1 ff. *de servitutibus* (Dig. 8. 1); for that instead of "of private right" should be read "*privato jure*," neither the reason nor the necessity of the law persuades us, and the meaning of Scævola is perfectly plain and perspicuous in the words thus retained. With regard to the latter class above referred to, viz., those who possess no estates near the river bank, I should think it is no way allowed them, according to law, to build in a public river on private authority, or become the owners of what is thus built, for as buildings accede to the soil whenever the owner of the soil appears. rather, therefore, should the buildings accede to those who possess unlimited estates near the bank: since they are those to whom the use of the bank belongs, and what is built by others on the bank, *l. qui autem* 15 ff. *de acquirendo rer. dom.* (Dig. 41. 1), by way of distinction to that which is built on the seashore, *l. quid in litore* 14 ff. *ead. tit.* (41. 1). Therefore the bottom of the river also seems to belong to him, by law of ownership, as far at least as it has ceased to be covered with water and begins to do the duty of the bed of a river; which may either happen by building on it, the water thus not flowing down there on account of the building, or by the formation of an island, or the desertion of the whole channel. As, therefore, an island rising in a river belongs to those who hold the estates along the banks, so also what is built in a stream belongs to them by the same reason. From the case of an island rising in a river to the case of building in a river, the inference is certainly rightly made, as Labeo tells us in *l. pen. ult. ff. de acquir. rer. domin.* (Dig. 41. 1). "If," says he, "what arises in or is built on a public river is public, an island, also, which arises in a river ought to be public." Not that it was the opinion of the Juriconsult that such island or building regularly belongs to the public (for he had already laid down otherwise as to an island in the same, *l. penult.* § 1, 2, 3), but because he believed that the condition of what thus arose in a river and what was built on it was the same. But you will say, whither tends then that comparison and assimilation made by Ulpian between what is built in a public river and on a public way and on the seashore, when, in *d. l. fluminum* 24 ff. *de damno inf.* (Dig. 39. 2), he says "that the use of public rivers is common, just as is the use of public roads, and of the seashore: on them, therefore, it is publicly allowed to anyone to build or destroy." It might appear to be the consequence of this that, just as what is built on the seashore cedes to the builder, according to what has been already stated, so what is constructed on a public river is acquired by every constructor by right of dominion, without any distinction as to whether he possesses land near the river bank or not. But it will be apparent to the closer observer that the analogy of law will not allow us to extend this beyond the case of rivers bounded by limited fields. In these alluvion does not pass to those having estates close to the river bank, *l. in agris* 16 ff. *de acquiren. rer. domin.* (Dig. 41. 1), nor does an island rising in the river, nor what is built thereon, nor a river-bed deserted by the stream. For just as an island rising in the sea, and by a parity of reasoning that part of the sea occupied

by what is built thereupon, is immediately acquired by the occupier in right of dominion, so the same rule obtains in regard to islands arising in rivers, opposite to defined fields on the banks, and by parity of reasoning, in regard to what is built thereupon, so that it becomes the property of the occupier or constructor, as Ulpian also witnesses in *l. 1 § si insula 6 ff. de fluminibus* (Dig. 43, 12.) It is therefore clear that what is built on a river opposite to the fields of others, which are not defined, cedes to the owners of such fields: but what is put up opposite to defined fields becomes the property of the builder, together with that part of the bed which is occupied by being built upon, provided only that no injury is done, either public or private. Therefore it is advisable to obtain permission to construct, and thus to construct "publicly," according to *d. l. 24 ff. de damno infecti* (Dig. 29, 2): as has been more fully said previously, concerning building on the sea and seashore (*ante p. 133*) Again, as according to our customs, and those of other nations, the shores of the sea and of rivers are counted among the regal rights or domains of the Princeps, *libr. 2 feudorum tit. 56*; so, if you except only navigation and its consequences, their use is not common to all, nor is it allowed to anyone to fish with nets in a river, and much less to build on the bottom of a river beyond strengthening its bank, nor to build on the seashore, nor to lead water from a public river, nor to raise mill-houses, unless a concession has been obtained nominately from the Princeps, or him to whom the care of the Princeps' rights of dominion were entrusted, so that to obtain that permission, which was a matter of prudence according to Roman law, is now a matter of absolute necessity. *Gudelinus de jure noviss. libr. 5 cap. 3. vers quæ in predicto seu num. 5, Vultejus de feudis libr. 1 cap. 5 num. 7. Hugo Grotius manuduct. libr. 2 cap. 1 num. 15 et seqq. (Maasdorp's Transl. p. 62 et seq.) Groenewegen ad § 2 Instit. de rer. divis. Paulus Voet ad § 1 Instit. eod. tit. num. 7 et ad § 2 num. 2 & 4 et ad § 4 num. ult. ibique plures citati.*

10. Things belong to a universitas which, by right of ownership belong to a corporation, say to a town or village, or a district or a body. Such things are not the property of individuals, as the Jctus shows by various arguments in *l. in tantum 6 § 1 ff. h. t.* (Dig. 1, 8) *l. sicut 7 § 1 ff. quod cujusque universit. nomine, &c.* (Dig. 3, 4.) Concerning which more fully in *d. tit. quod cujusque universitatis nomine vel contra eum agatur.* (*Post*; *Tit. 3, 4*)

11. Another division of things is into corporeal or incorporeal. The former are things which, by their nature, are capable of being handled; the latter which cannot be handled, and consist in a right (*jus*), such as servitudes, inheritances, debts, &c. There are three species of corporeal things—some are movable, such as furniture; or such as those things which, though heavy, are still so arranged that they can be moved, as movable storehouses, *l. Jctus horreum 60 ff. de acquir. rerum domin.* (Dig. 41, 1.), ships, even the very largest, *l. 1 § 6 et 7 ff. de vi et vi armata* (Dig. 43, 16), *l. vi facit, 20 § pen. ff. quod vi aut clam* (Dig. 43, 20), and, on the analogy of these, water-mills standing at anchor, not affixed to land, and camp-mills which are wont to be placed on wagons, *l. dolia 26 § 1 ff. de instruct. vel instrum. legato* (Dig. 33, 7) *Tyraquellus de retractu gentil. § 1 gloss. 7 num. 92., Argentæus ad consuet. Britann. art. 408 gloss. 2 num. 1 in f. et 2 in princ., Berlichius conclus. pract. part 3 concl. 30 num. 10, Carpovius defin. for. part 3 constit. 24 defin. 8. Parens p. mem. Paulus Voet de mobilibus et immobil. cap. 15 num. 7 & 8.* Another species is immovables, as estates; another species are those moving them-

selves, as slaves and animals; these are often comprehended under movables, when the laws, simply drawing distinction between movables and immovables, lay down anything, as, for instance, in defining the time necessary for fulfilling prescriptions, *pr. Inst. de usucapionibus* (Inst. 2. 6) *l. ult. C. de longi temp. præscript.* (C. 7, 22): *tit. Inst. de reb. corporal. et incorporal.* (Instit. 2. 2), *l. 1 § 1 ff. h. t.* (Dig. 1. 8.)

12. It, however, not unfrequently happens in law that fungible things, consisting in weight, number, or measure, and really corporeal, are often opposed to their own bodies, in so far that in such fungible things, *quæ fungibles*, the bodies are not considered, but the quantities, *l. talis scriptura 30 pr. de legatis 1* (Dig. 30. 1), *l. si is cui 94 § sin autem 1 ff. de solution.* (Dig. 46. 3), *l. si pænæ 1, 9; § si falso 2 ff. de conduct. indeb.* (Dig. 12. 6) Just as, on the contrary, the bodies are spoken of whenever the idea of them is not taken as consisting principally in weight, measure, or number, *l. si servus legatus 108 § qui quinque 10 ff. de legat.,* (Dig. 30. 1): *l. 1 § sed et si 7 ff. de dote prælegat.* (33. 4); *d. l. talis scriptura 30 § pen. ff. de legat.* (1 Dig. 30. 2).

13. Nor does it thus less often happen that a thing which in its nature is movable is considered as an immovable when it is regarded as part of, and an accession to, an immovable. Slaves are really movables if regarded in themselves, and according to their own nature, but if they are annexed to an estate, they are by right of the law accounted as immovables, and cease to be regarded according to their own proper nature, *arg. l. Quemadmodum originarios 7 et l. 11 C. de agricol. et censitis* (C. 11. 47) *l. longæ 3 ff. de divers. temp. præscript.* (Dig. 44. 3) That estate fruits are movable, natural reason dictates, and so it is laid down by Trojan, *l. ult. § 1 2 ff. de requir. reis* (Dig. 9. 40.) *l. fundi 17 § sed et 1 ff. de act. empt.* (Dig. 19. 1) Those, however, which are still hanging ought to be considered as part of the estate, and therefore to be judged by the law of immovables, as is evident from *l. fructus pendentes 44 ff. de rei vindic.* (Dig. 6. 1) *l. ult. § fructus 6 ff. quæ in fraud. credit. alien.* (Dig. 42. 8) *l. quaesitum 12 § eo vero 11 ff. de instruct. vel. instrument. legat.* (Dig. 33. 7), *l. si servus 61 § locavi 8 ff. de furtis* (Dig. 47. 2) Chassenæus ad consuet. Burgund. rubr. 4 § 2 in verbis omnium mobilium num. 20, Mantica de conject. ult. volunt. libr. 9 tit. 3 num. 6, 7, Tyraquelus de retract. gentil. § 1 gloss. 7 num. 37 et 43. Andr. Gayl libr. 2 observ. 10 num. 3. Georg. de Cabedo decision. Lusitan. 68 num. 1. 2. In the same way with metals, precious stones, sand, and chalk, and whatever is in metallic mines or stone-quarries, &c. Trees adhering to the soil are accounted immovable, as parts of estates: when they fall down, however, or are rooted up, or cut down, they cease to be parts of the soil, and are thereafter to be reckoned among movables; nor do they any longer follow the rights of the estate or of the house; nor when the estate is sold do they belong to the purchaser, even if they may not have been nominately excepted, *l. fundi 17 § fundo 2 vers ligna et § si ruta et cæsa 6 l. Quintus Mucius 40 ff. de action. empti* (Dig. 19. 1): *l. si post inspectum 9 ff. de peric. et commod. rei. vend.* (Dig. 18. 6) *arg. l. fructus 7 § si vir 13 ff. solut. matrimon.* (Dig. 24. 3) *l. sed si meis 26 § arbor 2 ff. de acquir. rer. domin.* (Dig. 41. 1) Berlichius part. 3 conclus. 30 num. 19, Modestinus Pistoris part 3 quaest. 124 num. 87 et seqq. Colerus decis. 59 num. ult. Paulus Voet de naturâ mobil. et immobil. cap 24 num. 4 et 9.

14. But what are generally regarded as immovables may yet, by the special disposition of the legislator, or by the intention or act of the owner, be regarded as movables, as far as concerns legal consequences; or

vice versâ. And thus although the larger trees adhering to the soil are, as parts of the estate, said to be immovable; by the law of Flanders, however, they are without doubt accustomed to be accounted as movables. *Instructio Curie Flandricæ* 15 Octob. 1661, art. 351, 352, vol. 2 placit. *Hol. pag.* 2752. And with regard to the act of the owner, if what were formerly movables are joined to buildings, not for temporary, but for perpetual use, whether they are beams, or columns, or marble pieces, they begin to be part of the buildings, and thus to be immovable: indeed, if they are taken off with the intention of replacing, the same is to be said, *l. fundi* 17 § *Labeo* 7 et §§ *seqq. ff. de act. emti.* (Dig. 19. 1): nor is it to be doubted that when buildings are thrown down with the intention that they shall be restored, the ruins also ought to be accounted as immovables, in as far as they may be suited to the restoration of the new house, *Papon. libr.* 17 tit. 4 in *appendice arrest.* 1. The same is to be laid down as to movables taken by decision of the head of a family to a certain place, for the sake of perpetual use, say to a house or estate, so that they may perpetually remain there for the sake of such use, even if they have never yet been naturally joined to immovables, nor, though intended to be so joined, have yet begun to be joined to the immovables, provided only they have been carried to those buildings or estates to which they have to be joined, *d. l. fundi* 17 § 2, 7, 8 *ff. de act. emti.* (Dig. 19. 1); *arg. l. ex facto* 35 § *rerum* 3 *ff. de heredit. instit.* (Dig. 28. 5) *l. debitor* 32 *ff. de pignor. et hypothec.* (Dig. 20. 1): *l. si ita legatum* 86 *ff. de legatis* 3 (Dig. 30. 3) *Mævius ad jus Lubec. quæst. prælimin.* 6 num. 20 et *seqq. Argentracus ad consuetud. Britann.* art. 408 *Gloss.* 2, num. 2, 3, 4, 5. *Tyraquellus de jure primogenituræ quæst.* 48 num. 3 et *seqq. Paulus Voet de mobil. et immobil. cap.* 24 et 25. *Wesel ad novel. constit. Ultraject.* art. 12 num. 10, *Rodenburch de jure conjugum tract. prælimin. de statut. diver. tit.* 2 *cap.* 2 num. 5 in *med.*

15. But money intended by a paterfamilias for the purchase of immovable things, and set aside by him for that purpose, is not to be regarded as immovables; both because it in itself and in its own nature is movable, and cannot be considered as accessory to any other immovable thing as its principal; and also because a mere intention, without an act or fulfilment or effecting of such intention, cannot alter the nature of money, *arg. l. si il quad* 58 § *item Celsus* 1 *ff. pro socio* (Dig. 17. 2) *l. cætera* 41 § *sed et si paravit* 14 et 15 *ff. de legatis* 1 (Dig. 30. 1): also, lastly, because only in one case, as a particular privilege to minors, is it found laid down that such money shall not, on the analogy of an immovable thing, be capable of alienation except by a decree, *l. quid ergo* 3 § *quid ergo* 6 *ff. de contrar. tut. et utili act.* (Dig. 27. 4) *junct. l. à Divo Pio* 15 § *ult. ff. de re judicata* (Dig. 42. 1) *Andr. Gayl libr.* 2, obs. 11, *Papon. libr.* 17 tit. 4 *arrest* 3 & 6, *Tyraquellus de retract. gentilit.* § 1 *gloss.* 7 num. 108, 109, *Wissenbach ad Pandect. vol.* 2 *disp.* 3, *th.* 9, *Berlichius part* 3, *conclus.* 30 num. 4 *ibique plures citat.: dissent. Choppinus ad leges Andium libr.* 2, *part* 1, *cap.* 2, *tit.* 2, num. 14 in *med.* *Chassenæus ad consuet. Burgund. rubr.* 4, § 2. *verbo omnium mobilium*, num. 16.

16. Nor, similarly, will you rightly reckon the price obtained from the sale of immovable things as immovable: although the price sometimes stands, as far as certain effects of the law are concerned, in the place of the thing sold, and is judged by the same law as the thing itself: as is the case in *l. si et rem.* 22 *ff. de petit. hered.* (Dig. 5. 3), and *vice versâ* in the case *l. si ut proponis* 8 *C. de rei vindic.* (Dig. 6. 1) *l. si*

tutor 2 ff. quando ex facto tutor. (Dig. 26. 9), for it obtains as a rule that neither does the thing bought become his whose was the money, nor, on the other hand, does the money pass to him whose was the thing; and, generally, neither does the thing come in to the place of the price, nor does the price come into the place of the thing, and assume its nature and qualities, *arg. l. qui vas argenteum 48 § ult. ff. de furtis* (Dig. 47. 2) *l. si ex ea 6 C. de rei vindicat.* (C. 3. 32) *l. idemque 7 in fine ff. qui potior. in pign.* (Dig. 20. 4) *l. ex pecuniâ 12 C. de jure dot.* (C. 5 12) The consequence is that neither is money obtained from immovable things considered in the place of immovables, nor is it ruled by the law of immovables, even if it be taken as again destined for a new purchase of other immovable things, *Sande decis. Frisic. libr. 2, tit. 5, defin. 3, circa med. Schurpf. cent 1 consil. 11, Gothofredus ad l. qui vas 48 § ult. ff. de furtis* (Dig. 47. 2.)

17. That I should further specifically mention which things are to be regarded as movables, which as immovables, is neither allowed by the nature of my undertaking, nor would it be difficult to gather this from such authors as have specially devoted themselves to treat of the subject: see *Paul Voet de mobilibus et immobilibus*; *Berlichius, part 3, conclus. 30.*

18. Incorporeal things are things which can neither be handled nor touched, and consist in a right, as inheritances, servitudes, debts, actions, and revenues, *tot. tit. Instit. de reb. corpor. et incorporal.* (Instit. 2. 2) But as the greatest portion of the municipal laws ignores the division into corporeal and incorporeal, and is content with the mere division into movables and immovables: witness *Antonius Matthæus de auctionibus libr. 1, cap. 3, num. 13, et de criminibus lib. 48, tit. 20, cap. 4, num. 21*, it will be worth while to enquire under which class each incorporeal thing is to be accounted, whether movable or immovable.

19. As regards an inheritance, as it is a whole composed of movable and immovable, and incorporeal things, we can scarcely rank it wholly only among immovables, or, *vice versâ*, among movables, but must rather consider the nature of each thing found in the estate: in almost the same way as is laid down with reference to *peculium*; for although only corporeal things can be claimed by *rei vindicatio*, not incorporeal things, yet "in *peculium*," as a legal term, both are comprehended, as Julianus wrote, "the vindication of a *peculium* is not as that of a flock, but the single things must be claimed," *l. vindicatio 50 ff. de rei vindicat.* (Dig. 6. 1)

20. As regards prædial servitudes, it is without doubt that they come within the number of immovable things, for they are nothing else than the rights and qualities of immovable things or estates, which the estates have as such, accessions to estates, which follow the nature of their principal, as reason dictates, and as *Hugo Grotius* also argues, *manuduct. ad Jurispr. Holl. lib. 2 cap. 33, (Maasdorp p. 219)* diminutions of the right of ownership, in so far as by the right of the ownership of the servient tenement, anything is diminished taken away and transferred to the owner of the dominant tenement, *l. quid aliud 86 ff. de verb. signific.* (Dig. 50. 16) *l. qui fundum 12 ff. quemadmodum servitut. amitt.* (Dig. 8. 6) : *arg. l. si quam 2 C. de servitut. et aquâ* (C. 3. 34) *Tyracuellus de retract. gentil. § 1, gloss. 5, num. 2, Andr. Gayl, libr. 2, observ. 11, num. ult.* It is otherwise in usufruct and similar personal servitudes, for they do not always attach to immovable things, but are frequently wont to be constituted over movables. They are thus rather

to be sometimes accounted as movables, and sometimes as immovables, according as they are imposed upon movable or immovable things: especially as it is laid down concerning the interdict *unde-vi*, which only has place in immovables, that the usufructuary of immovables, but not of movables, can use that possessory remedy, *l. quod est* 3 § *pertinet* 15 ff. *de vi et vi armata* (Dig. 43, 16); and in the matter of prescription usufruct copies proprietary right, and prescription runs to the prejudice of the usufructuary in the same length of time as the right of ownership itself would be proscribed to the proprietor, *l. pen.* § *sed nos* 1 *C. de usufructu* (C. 3, 33.)

21. As to actions, although it has been thought by many that they are to be classified by the condition of the thing to which they refer, and therefore when referring to movable things are to be accounted movable, and when referring to immovable things to be considered immovable. *Andr. Gayl lib. 2, observ. 11, num. 10, Tyraquellus de retract. gentil.* § 1 gloss. 7, num. 15, *Berlichius part 3, conclus. 33, num. 5, Wesel ad novell. constit. Ultraject. art. 12, num. 3; Consult. Jurisc. Holl. part 3, vol. 2, consil. 110*, and a long string of authors there cited. Yet I think it more consonant to the rationale of the law that we should distinguish between *actiones in rem* and *actiones in personam*—real and personal actions. If the action is *in personam*, I think it ought to be accounted movable, whether it refer to a movable or an immovable thing; whether it is established to obtain the dominium of movables or immovables, or their use, or something similar, as the action of purchase and sale, letting and hiring, commodate, &c. For as the right and the action only attach to the person of the creditor, not to his things, and as it is only the person of the debtor that is obliged to give, do, or furnish anything; and as neither the thing itself which is to be given or furnished, although immovable, can in any way be made subject to the creditor, or bound to him by the chain of a *jus in re*, the consequence is that as the person itself of the debtor or creditor is movable, and as he can transfer his domicile at discretion, so also a personal action, inherent only in the bones of his person, is adjudged to be a movable, as an accessory of his. And certainly neither reason nor law persuades that the thing itself, which constitutes no foundation in personal actions, should make them movables or immovables; especially as in personal actions it is clear that often the things claimed are not, properly speaking, movables or immovables, but it is the fulfilment of a personal act which is sought, or merely the use of movable or immovable things: as to which species of personal actions there would be inextricable difficulties in settling the question whether they ought to be classed as movables or immovables, if the more common opinion of the interpreters given above were to be admitted. Nor does it assist you that he who has an action for recovering a thing is also supposed to have the thing itself, and that he who has an action as to a thing is considered to have the thing in his possession, *l. is. qui actionem* 15 ff. *de regulis juris* (Dig. 50. 17), *l. bonorum appellatio* 49, *l. id apud se* 143 ff. *de verbor. significat.* (Dig. 50. 16) For in the first place it is not said to be so as a matter of fact, but nearly everywhere the Juriconsults qualifiedly say it seems to be so. Nor is it said in any other sense than that, broadly taken, everything is supposed to be ours, and in our patrimony, which is over after the deduction of our debts, everything in which then blesses us, and by which the whole mass of our patrimony can be said to be the fuller and richer: whether we possess the thing by

right of ownership, or whether we have a petitory or persecutory action in respect of the thing, *d. l. 49 ff. de verb. signif.* (Dig. 50. 16) Lastly, if the question be as to personal actions, it is indeed less to have the action than the thing, *l. minus est 204 ff. de reg. juris* (Dig. 50. 17), since he cannot emphatically be regarded as the possessor of immovables, freed from the necessity of giving security, who only has a personal action for the getting an estate, *l. sciendum 15 § diversa causa 4 ff. qui satisfacere cog.* (Dig. 2. 8.) It is otherwise in real actions, as to which you may, not improperly, take what is said in *d. l. is qui actionem 15 ff. de regulis juris* (Dig. 50. 17) *et l. rem in bonis 52 ff. de acquirend. rer. domin.* (Dig. 41. 1), for example, that we are understood to have a thing among our goods whenever, being in possession, we can plead an exception, or whenever, losing possession of them, we can bring an action to recover. And he who has the action to recover a thing is said to seem to have the thing. From this, then, as a foundation, is a solution of this point to be sought as regards real actions: viz., that they are to be accounted among immovables if they refer to an immovable thing, but are to be reckoned as movables if they are for the recovery of a movable thing. For, as in actions of this nature, the *jus in re* by which the thing is affected and bound is the whole foundation of the proceeding, it is thus not unreasonable to gather from the very nature and quality of the things thus bound, whether that action which arises from them is a movable or an immovable. And although we find the more valuable movables compared to immovables in respect of certain legal effects, still as in a case of doubt the real nature of a thing is to be regarded, and not a fiction, still in this discussion no distinction it seems ought to be made between common and more costly movables.

22. As to rents (*reditus*), there is a great controversy among the commentators. I think we must here first distinguish between annual rents which have already fallen due, and the right of demanding rents, from which right the power to enforce payment recurs in particular years and at stated times. With regard to rents the day of whose obligation has already come, you will most correctly class them among movables, whether the original right itself from which the necessity of payment is annually re-born is to be classed among movables or immovables, according to the distinctions presently to be laid down. For rents of which the due date has come should be regarded in no other light than that of fruits already separated from the soil. For although fruits born from immovables are considered as immovables while still pendant, yet, on separation, they immediately assume the nature and condition of movables, as already said (*ante p. 138*). And this is also to be laid down as to the rents of immovables let, which come under the appellation of civil fruits, and, on the analogy of annual rents, yearly recurrent. So that if the day of payment has come, as to part, and as to part not, so far such rents are to be accounted as movables, as being the substitute of the fruits themselves, *arg. l. si operas 16 l. defuncti 58 ff. de usufructu* (Dig. 7. 5) *Andr. Gayl lib. 2 observat. 10, num. 3, Christianus ad Leg. Mechlinienses tit. 16 art. 35 num. 17; Carpzovius definit. forens. part 3 constit. 24 def. 5. Tyraquellus de retract. gentil. § 1, gloss. 6, num. 10; Papon. libr. 17. tit. 4. arrest. 1 in pr., Modestinus Pistoris quaest. 124 § 1; and annotating on him, Jacobus Schultes, num. 72 et seqq. Chasseneus ad consuetud. Burgund. rubr. 4, § 2, verbo "omnium*

20, *Berlichius part. 3. conclus. 34, num. 36. Responsa* 3, vol. 2. *consil. 110, num. 4.*

ward to the right itself of rents. There are those between redeemable and non-redeemable rents: the one in the catalogue of immovables, the latter in that of movables. There are others who declare perpetual rents to be immovable, and others who declare annual rents to be movable, whether they are due by a merely personal obligation. As to which see *Christineus de iur. tit. 7, art. 8, num. 6; Argentæus ad consuet. Britan. tit. 4, 5. Andr. Gayl. libr. 2. obs. 10. Tyraquellus de retract. gloss. 6, num. 1 et seqq. Berlichius part 3, conclus. pract. 34. de def. for. part. 3, const. 24 def. 1 et seqq. Barry de succession. tit. 7, num. 16. Jac. Schultes ad Modest. Pistor. quæst. 124, num. 19.*

But, to discuss this more fully, I think it ought to be considered that this right of rents may be very strictly taken, or very loosely, so that it may comprehend—besides the annual rents usually so called, and having a great affinity with interest—also very many other rights which we are accustomed to reckon in our patrie, and which are found to furnish what is useful. These rights, besides the annual rents specially so called, are by the almost common consent among all nations, and the reckoning of the interpreters, accustomed to be ranked among immovables: as for instance the right of charge for passage through on foot, over a bridge, through a gate, the right of tithe, jurisdictio, the right of gathering redeemable or irredeemable rates, ground rents, annual canon or rent from emphyteutical lands, imposts from hereditary dignities, laudimia (right of the *leu*), rights of hunting, fishing, salt-pits, rents of metal mines, and the like, which partly come under the name of the “lesser regal rights,” and are treated of in *libr. 2, feudorum tit. 56*, and in *Sixtinus de regalibus*, and by the commentators here and there. And thus in the placats of the Counts of Holland, and also of the States-General, you will very often find such rights as these specially ranked in the catalogue of immovables, viz., *oynsen* (i. e., reserved rent on immovables), *thynsen* (i. e., small annual rent, on payment whereof ownership lapses), turkey and fowl money, bridge moneys, toll dues, market moneys, May and Spring requests, *haartstede gelden*, *turfmaten*, imposts, grinding dues, rents of the lord, tithes, right of after-purchase, passage moneys over waters, bridges, sluices, roads, and many others: *Placaat op 't redres van de Verpondingen over Holland en West Vriesland van den 3 August. 1627, art. 1, vol. 1, pag. 1954 in fine; p. 1315 and placaat of 17 Juli 1643 art. 1, d. vol. 1, pag. 1953 in fine; Placaat of the States-General op 't invoeren van de verpondingen over Brabant 5 Julii 1635, art. 1, d. vol. 1, pag. 1527 et seqq.; also Placaat of the States-General anno 1593, 22 Octobr. in præfatione, d. vol. 1, pag. 1523; My father Paul Voet de naturâ mobil. et immobil. cap. 9, num. 20 et seqq. et de Statutis, sect. 9, cap. 1, num. 13, 14, Van Leeuwen Censur. For. part 1 libr. 2, cap. 1 num. 4: although with regard to hunting rights appertaining to dignities, it has been variously decided as to things in Gallia, whether they are movable or immovable, as Francisc. de Barry observes, de succession. libr. 9, tit. 7, num. 11.*

24. Annual rents, specially so called, are not all of the same condition; but some are merely personal, those, namely, which a person owes, so that no immovable thing is charged with their rendering; others are purely real, for which only immovable things are principally

bound, so that the person does not owe them, unless because he is the owner of the things by which they are due. He ceases to owe them whenever he alienates the estate, or if the estate perish by a chasm made by the force of the water, or in any other way: in the same manner as prædial servitudes, imposed on an estate or buildings, follow the possessor of the estate, and cease to be due, many examples of which you will find in *Gelria* and elsewhere. Some again are mixed, for which both person and thing are bound: *vide Abraham à Wesel ad novell. constit. Ultrajectinas art. 20 passim. Lambertus Goris adversar. tract. 2. cap. 3. n. 1. et seqq. Sande de feudis Gelrias tract. 2. tit. 2, cap. 4, § 1, 2, 3, et 4.*

25. If purely real rents have been imposed on estates, it is not doubtful that they ought to be accounted among immovables, since they can be considered as parts of the estate itself transferred to another by testament or contract, for someone has so sold or legated or bound himself and his heirs by a personal obligation to impose a rent on the estate, and thus to a diminution of the estate he had in possession. For as soon as the right of rents was actually imposed on the estate, so that the contract imposing a rent should be considered as complete, or the last will of the deceased was there, and as soon, therefore, as all personal obligation which had arisen is extinguished, at once thereupon that right of dominion came to be diminished which he who constituted the rent charge had on the estate, and was transferred to him in whose favor it was constituted. So that from the right of ownership, widely taken, as much was lost to him who imposed the rent charge as acceded to him who acquired it, as Hugo Grotius in a similar case argues in his *Introductio to Dutch Jurisprudence lib. 2, cap. 33 (Maasdorp p. 219)*, *Lamb. Goris adversar. tract. 2. cap. 3, num. 5, 6, 7, et 13.* Thence, as real servitudes imposed on estates are reckoned as immovables, as I have above laid down, so by parity of reasoning and on the same basis, these real rents are reckoned as immovables. This view is not foreign even to the fundamental principles of Roman law, since *annonæ civiles* (the right of collecting public bread from families or at their cost, as to which see the Commentators, *ad tit. Cod. de annon. civilibus*, et *Jacob Gothofredus ad tit. Cod. Theodos. de annonis civicis et pane gradili*) are found there reckoned among immovables: *novell 7 in præfat. ante med., l. jubemus 14 C. de sacros. eccles. (1. 2.)* In *regione Neomugiensi, et Velavica et Artesiâ*, however, such real rents are reckoned as movables, as *Lambertus Goris* notes in *d. tract. 2 cap. 3 h. 7 in fine.*

26. With reference to mixed rents, for which both the person and immovable property are bound, it has become the custom by the common practice of Holland to rank them as movables: on this ground that by intervening part payment of the debtor they lose their name and cease to be rents: as witnesses, *Neostadius de feudis Hollandiæ cap. ult. num. 27. Sim. Van Leeuwen cens. for. part 1, lib. 2, cap. 1, num. 4. Consult. Jctorum Holland. part 5, consil. 204 in fine.* And that the same was the view of the inhabitants of Breda, my father, *Paul Voet*, witnesses: *tract. de mobil. et immobilibus cap. 8, num. ult.* But when there is no such peculiar custom, and such mixed rents are so imposed on estates by last will, or by medium of a contract, that the creditor has no power to recover the capital of the rents, and the proverb holds, "once rents always rents," they are more frequently classed as immovables by the pragmatics; and even the States-General of federated Belgium have done so in a certain privilege conceded to the English nation, 9

January, 1587, vol. 1 *placitorum*, pag. 762, *fere in fine et* 763, in *pr.* agreeably to the Canonical law in *Olementina cap. Exivi de paradiso, versu cumque annui redditus, de verb. signif., d. part 5 consult Jctorum Holl. cons. 204 in fine et part 2 consil. 1, vers 2, dicimus pro solutione, Mysengerius Art. 1, observ. 67, Berlichius part 3 conclus. 34, Carpzovius definit. forens. part 3, constit. 24, defin. 1 et seqq. Christinæus ad Leg. Mechlin. tit. 7, art. 8, num. 6, Rodenburch de jure conjugum. in prælim. tract. de Statutis diversitate tit. 2 cap. 2, num. 2, Wesel ad novell. constit. Ultraj. art. 12, num. 6. Considering that by modern practice a hypothecary action is regarded as a principal action in perpetual rents fixed on a certain estate: as Mudsæus says, *ad rubric. ff. de pignor. et hypothec. num. 3.**

27. As nowadays—the too great scrupulousness of the Canon Law in respect of interest having been shaken—instead of the ancient sale of annual rents, simple givings of moneys are found to prevail in many places under a pact for moderate interest, so that the creditor has the power of recovering the capital, not merely where a personal obligation only has intervened, but also where, in order to recover the capital and to secure the interest, immovable things are solemnly bound according to the law of the land:—I think it consonant to reason that whenever in any place a right prevails of recovering the capital secured by hypothec, whether it is from loan, or the balance of purchase money, or from any other cause, that a debt bearing interest or not bearing interest has arisen, secured by a hypothec constituted on immovables, I think that it ought to be reckoned in the catalogue of movables. Since it is from that which is the principal that the nature of anything must be estimated, and since the principal obligation here, referring as it does to a person, and moreover to a movable, viz., the payment of money, is beyond all doubt also a movable, according to what has been laid down: it would be absurd that where a hypothec accedes to immovables merely for the purpose of security, it should change that which is movable, and of which it is only an accession, into what is immovable. Add to this that, if the opposite opinion were to prevail, it would happen that all actions of wards and those who, like them, have a legal hypothec as against tutors and curators, also all recoveries of movables bequeathed by testament, and many others, ought to be ranked among immovables, since as an adjunct to all these there is also attaching a right of legal hypothec on immovables. That this would be opposed to reason is quite evident. *Charondus, libr. 7, responsor. cap. 47, Francisc. de Barry de success. libr. 9 tit. 7, num. 12. Carpzovius defin. forens. part 3, constit. 23, def. 9, num. 7.* Nor will you on that account deny that such debts, strengthened by hypothecs on immovables, copy the condition of immovable things with us in respect of various legal effects: for they cannot be sold, nor placed under hypothec, except according to the law of the land, and on payment of the fortieth coin, *Placit. Ordin. Holl. de nummo 50, art. 7 et seqq. vol. pag. 1955 et 1956. Groenewegen d. ll. abrogatis ad l. si convenerit. 18 ff. de pignorat. art.* And with regard to the rights of succession, in a certain privilege conceded to the English nation by the States-General of federated Belgium, it is ordered that they shall be transferred like immovables, according to the laws of the place where they are situate, *Placit. Ordin. General 9 Januar. 1587, vol. 1, placit Holland, pag. 762 in fine et 763.*

28. What has been so far said of rents and debts is also of application whenever they are due by a whole body, say by a province, a town, a village, a district, or an orphanage: if nothing is found specially

laid down concerning them to which class of things they are to be referred. For if annual rents were not solemnly imposed by law on certain immovable things which by the right ownership belong to a whole body, there is no reason why they should not be ranked among movables : since neither primarily nor secondarily and by consequence, can immovable things be said to be the foundation of exacting such rents. Rather are personal obligations their foundation, by which obligations just as private persons are bound, so also are colleges and universities, who in contracting fill the position of persons. In vain do certain writers strain all their powers of intellect in contending for the opposite, viz., *Christianus Rodenburch de jure conjugum in tract. prelim. de Statut. diversit. tit. 2 cap 2 num. 3, & Abraham à Wesel ad novell. constit. Ultraject. art. 12 num. 7 et seqq.* The latter of these, in order that he may seem zealously to follow the decision in the novel of the Ultrajectine counts, and the middle course of Rodenburch, without just ground of reason, and beyond the scope and intention of the legislators themselves, ranks rents and debts and such like obligations in the class of immovables. Beyond their scope, I say, because it is only in respect of donation or testate and intestate succession that these rents and securities are reckoned among immovables, "*in everything else the law in force remaining as it is*"; which sufficiently shows that only in the cases put forward are such rents to be ruled by the law of immovables. And I say, also, "without reason," because when they say "that rents of this sort have often no personal obligation annexed, and when the provincial security is issued, the tributes, the imposts, the goods of the state are bound ; but the persons of the counts in no way so," this I think is without force. For let it be so, that the persons of the counts are not bound for the debts of the State, and that the directors of the East India Society cannot be summoned privately, inasmuch as the whole body being the debtor, its individual members do not owe, *l. sicut 7 § si quid 1 ff. quod cujusque universit. nom.* (Dig. 3. 4) Still the personal obligation is not on that account wanting. For who, unless he is a stranger to our law, will deny that *Universitates* are considered, in their contracts and last wills, to stand in the place of persons, since in these matters they contract by means of agents and syndics, and to them, as persons, inheritances are left, and legacies, and usufruct, a personal servitude inherent as it were in the bones of a person : and by the feigned death of the universities these rights also perish, so that there is thus quite a personal obligation whenever anything is due to a universitas by contract, or it itself owes anything, *d. l. 7 § 1 et tit. tit. ff. quod cujusque universit. nomine vel contra* (Dig. 3. 4) *l. omnibus civitatibus 26 ff. ad Senatusc. Trebell.* (Dig. 36. 1) : *l. civibus 2 ff. de reb. dubiis* (Dig. 34. 5.) *l. hereditates 12 C. de hered. instit.* (Dig. 6. 24), *l. an usufructus 56 ff. de usufr.* (Dig. 7. 1) *l. si usufructus 26 ff. de stipulat. servit.* 45. 3. Nor is what they add any stronger,—that rents constituted over immovables come under the heading of immovables ; that the corporations of the province are not movable, but stable and perpetual, and therefore that the rents constituted by them are immovables. For since, as has been before said, universities and provinces are considered in contracts as in the place of, and clothed with the right of, a person, it cannot be that they should be considered as immovable things. And there is a great difference between a province, by means of a contract, constituting an annual rent charge, and between the annual rent charge being imposed on the province itself, as an immovable thing, which, accurately speaking, does not

happen. In the former case it is to be taken as a person, in the latter only as an immovable thing :—in the former as acting and contracting, in the latter as only suffering. And although it is true that universitates are stable and perpetual on account of the perpetual succession of persons which is in them, according to *l. proponebatur* 76 ff. *de iudiciis* (Dig. 5. 1.), and also that they cannot so move from place to place as private persons are wont to move from place to place, yet that does not help the opposite opinion, nor does it constitute a sufficient difference between private debtors and universitates debtors. For private persons bound by contract to give a rent charge are considered as perpetually living in their successors, since heirs, and the heirs of heirs, *ad infinitum*, represent the first obligee and remain bound through him; and although it more rarely happens, yet that universitates perish like persons, and even migrate from place to place, is abundantly evident from *l. 21 ff. quib. mod. usufructus vel usus amittitur* (Dig. 7. 4), and from Lasius on the migrations of nations. It as little affects the matter under discussion that many possess the greater part of their patrimony invested in these securities and rent charges owing by universities and provinces, and that they acquire for themselves such obligations as they do estates. For it would be as little unreasonable that the greatest part of such opulence should be invested in movables. It is well known that the whole substance of a merchant often consists in merchandise. It would be inept on that account merely, to say that merchandise should be ranked amongst immovables. Nor are those who differ in opinion aided by the formula inserted in securities as to annual interest and rents, and sometimes even as to the capital itself, by which *all the fruits and goods of a universitas*, whether they are *movable or immovable*, are said to be bound. For it is known that nothing is more frequent than that these and similar *formulae* are even inserted in the securities of private persons passed, not before the law of the land, but before a notary and witnesses, or in a private writing; yet it is well known that thereby, however, neither are the immovable goods of the debtors affected nor these securities themselves ranked in the list of immovables. And it is a vain way of escape to say that it is not necessary that the Princeps, as one freed from legal solemnities, should acknowledge the pledge of his immovable property before the law of the land, or establish a hypothec, and that he is considered to be bound by the real bond of pledge by the very fact that he has set aside certain goods of the state for the payment of the annual rents. For in the first place this argument could only find place in the case of the Princeps, and thus with regard to securities issued by one having rule over the whole province, and cannot apply to other securities issued by cities, villages, districts, orphanages, and other *universitates*, all of which it is certain are both bound by the laws, and use the law of right private persons, *l. eum que vectigal* 16 ff. *de verbor. signif.* (Dig. 50. 16.) But, further, you cannot even generally admit that it is so in the case of a Princeps: for although he is freed from the laws, yet the Emperors declared that they wished to live according to the laws, a sentiment worthy of the majesty of the ruler, § *ult. Instit. quib. mod. test. infr.* (Inst. 2. 17) *l. digna* 4 *O. de legibus* (C. 1. 16) Whence it should be laid down that it should not be presumed in doubtful cases that they wanted to be free from the bonds of the law; but then only when they specially declared their wish, more especially when they do not reap any advantage from such an individual right, but rather a damage, and there would indeed be detriment to

them in the present case, as they would diminish their own real right and accord it to others: which is what private persons using similar obligatory securities would not do.

29. When we say that by modern practice incorporeal things are wont to be reduced to movables or immovables, and classed under those denominations, this only then obtains if the form of words demands it, or if there be any underlying necessity in the disposition affecting a universitas of goods. But if anything is said concerning movables or immovables in a disposition in which a universitas of goods is not necessarily contained, incorporeal things will not be classed under the name of movables or immovables, but will be looked upon as a distinct species from corporeal movables and immovables: what, on this principle, is to be laid down in a legacy of movables and immovables, or a hypothec, or a confiscation, or a donation of them, will be more fully laid down in their proper places: *vide Sande libr. 4 tit 4, defin. 6, Bodelant Cur. Ultraject. decis. 88, Molinæus ad. constit. Parisiensi. tit. 3, art. 94, gloss. 1, num. 19, Tyraquellus de retract. gentil. § 1 gloss. 5 num. 1, et gloss. 7, num. 1 et seqq. Carpovius defin. for. part. 3 constit. 24, defin. 1., Jac. Schultes ad Modest. Pistor. quæst. 124 num. 14 et seqq., Paulus Voet de mobil. et immobil. cap. 8, num. 1, Consult. Ictorum Holl. part 3 vol. 2, consil. 110, Wesel ad novell. constit., Ultraject. art. 12 num. 2, 3, and Christinaeus, Zypæus, Peckius, Berlichius, Thesaurus, Charondas, and others there cited.*

30. Nor is it astonishing that the enquiry is so very anxiously made on the point whether a thing is to be classed among movables or immovables, seeing that there is so great a difference to be observed between these two species of things, in as far as concerns many legal effects. For as a rule, wherever movables may in reality be found, they are yet considered to be there where the owner has his domicile; but immovables where they really are, and hence immovables are ruled by the law of the place where they are situated, movables by the law of the domicile of the owner, as is said hereafter [*quære, Voet must here be in error, and mean before.—Transl.*] *tit. de constit. princip. de statutis. [ante p. 60 et seq.—Trans.]* Since, therefore, personal actions—at least, by common consent, those which refer to a movable thing—are said to be ranked among movables, the consequence is that although, properly speaking, they are situated nowhere, as if incorporeal things, still they are taken to be there where the creditor in whose *dominium* and patrimony the actions are, has fixed his domicile. They are at Amsterdam; for instance, if a Venetian merchant owes money or merchandise to an Amsterdammer, although it is not to be repaid at Amsterdam, but at Venice, *Christinaeus ad Leg. Mechliniensis tit. 16, art. 39, num. 1, 2, 3, 4 et seqq. Andr. Gayl libr. 2, observat. 124 num. pen. et ult. Maevius ad leg. Lubec. quæst. praelimin. 6 num. 30 et seqq. Greven libr. 2 conclus. pract. conclus. 124 consil. 1. n. 1. et seqq. Molinæus ad consuet. Paris § 1, gloss. 4, num. 9. Abr. à Wesel ad novell. constit. Ultraject. art. 12 num. 4.* Although others are not wanting who confine these actions to the place of the debtor, where the recovery can be made: these are enumerated by *Tyraquellus de retract. gentil. § 36, gloss. 3, num. 15, 16, 17. Responsa Ictur. Holl. part 3, vol. 2, consil. 151, num. 7, 8.* Their view you will perhaps not improbably admit in confiscations of goods, if the lord of the territory in which the debtor resides wishes to adhere to his strict right: inasmuch as such a debt is more in the power of the judge who presides at the domicile of the debtor than he who presides

at the domicile of the creditor. Nor will you the less approve this view when the question arises as to taking away a personal action by prescription, for the prescription is completed in one time at the domicile of the debtor, and at another time at the domicile of the creditor. For that a debt not yet due is more in the power of the judge where the debtor has his domicile than where the creditor has it, is both manifest from this that the creditor must seek the competent court and judge of the debtor, and that it is not the judge of the creditor, but of the debtor, who can prohibit a debtor, at the request of a third party, from paying a creditor. And immovables frequently pass with the burden which is imposed on them, and in regard to them there can be the right of retraction, of primogeniture, and other similar things. These, however, have more rarely place in movables, and movables have not a following, *mobilia non habeant sequelam*, as will be said in *tit. de rei vindicat.*, (Post. Tit. 6. 1), and here and there through this work. Besides the immovable property of wards is alienated in one way, the movable property in another. And immovables are transferred, hypothecated, and distrained by judgment-execution, in a different way to movables. As will be more fully treated of in their own places. See meanwhile my father *Paul Voet tract. de naturâ mobil. et immobil. cap. 15 et seqq.*

TITLES IX. TO XXII.

It is considered unnecessary to translate these titles, which refer to the different kinds of Roman senators and magistrates, and contain nothing that seems of present application, except the two or three passages given below, *e. g.*, from titles XII. and XIV.

Title IX. treats of Senators.

Title X. treats of the office of Consul.

Title XI. treats of the office of Pretorian Præfect.

TITLE XII.

TREATS OF THE OFFICE OF URBAN PRÆFECT.

Lex 4 is of importance.

4. Prætors only exercised authority over civilians. Military subject to military authorities.

4. This their power and jurisdiction the præfects of the town only exercised over civilians, for the soldiers were more under their leaders, and especially under the heads of the army, *l. 1. O. de offic. milit. l. 1. C. de exhib. et transmitt. reis (C. 9. 3.) l. magisteriae 6. C. de juridict. omn. judicium. (C. 3. 13.) l. ult. C. de re militari (C. 12. 36.) l. viros 8 C. de divers. offic. et apparit. jud. (C. 12. 60.)* Some make certain exceptions: *e. g.*, unless there was a proceeding as to tribute-collation, *l. eos qui 5. C. de apparit. magistrorum militum agant (C. 1. 27.)* But as these laws do not treat of soldiers, but rather of the officers of the magistrates who are said "*militare*" in the exercise of their magisterial power, you can hardly admit these exceptions of the Roman law.

Title XIII. treats of the office of Quæstor.

TITLE XIV.

TREATS OF THE OFFICE OF PRÆTOR.

Lex 5, 6, 7 of this title are of importance.

SUMMARY.

5. Where a slave had acted as prætor, his condition of slavery being unknown, he representing himself free, what he had done was ratified. Not on the ground of common error, but of the approval of the people, and for the public benefit.
6. Where one who is really not a magistrate or a drawer of public instrument acts, has what he does validity? Voet thinks it depends on, *a*, whether a person acting was so considered by all the people, or by most, or, *b*, by only a few. And in the former case, whether, *c*, he really *was* appointed, even wrongly, or, *d*, not appointed at all. In *a* and *c* it would be valid; in *b* and *d* not. In *c* the appointee can be punished, but his work remains valid, whether the wrong appointment was known or unknown. This here again, not on the ground of common error, but of the approval of the people and for the public benefit.
7. Two points of doubt arise,—1. Are instruments drawn up by drawers of public instruments, beyond the provinces where they were nomi-

nately approved and admitted, valid? 2. Are instruments valid which are drawn up in the province where the drawer has been so admitted, but in another town or place than where they had permission to practise. As to 1, Voet's opinion is, *no*. As to 2, Voet's opinion (not, however, *distinctly* expressed) seems to be *yes*, inasmuch as, though in strictness of law they were invalid, that strictness was departed from in practice.

8. Urban Prætors nowadays have hardly anything in common with Roman Prætors.

Lex 5. Since, however, a certain state of facts arose, inasmuch as Barbarius Philippus, a slave who had run away from his master, conducted himself at Rome as a free man, and obtained the dignity of the prætorship, and issued many edicts; when his servile condition was afterwards found out, it was enquired whether what had been done by and before him were to be considered valid or not. And it was answered "that it was more humane that nothing of that he had done by edict or decree should be repudiated," and that everything done by those who had appeared and acted before this prætor should continue good, for their advantage and utility. Not on account of the common error of the people; for that cannot make law, since all law proceeds from the wish and consent of the legislator, which error excludes; but rather on account of the approval of the people, which followed on their having discussed the error and found out the truth. Also lest very many things done *bonâ fide* should be rescinded to the detriment of the state, and also because the people can give liberty to a slave or lay down a law that slaves can be elected to the prætorship, and therefore could bestow the prætorship on Barbarius, *l. Barbarius 3 ff. de offic. prætor.* (l. 14.) See, also, on this point, at length, *Jac. Gothofredus, libello singulari*.

6. As to the question whether what is done before a supposed magistrate or drawer up of written instruments (e. g., notary) will have the same validity as what is done before real drawers up of written instruments, or real magistrates, I think the whole matter is contained in the following distinctions: whether such a one was considered by all or by most to be a drawer up of written instruments or a magistrate, or only by a few who went to him. If only by a few, nothing of what was done before him, even by those who were ignorant, would stand. For then it would be a careless, and therefore inexcusable, error not to know that which very many know, and which anyone could have known by diligent enquiry, *l. nec supina b. l. regula 9 § sed facti 2 ff. de juris et facti ignor.* (Dig. 22. 6.) *arg. l. item si 7 § proinde et si 7 ff. de senatusc. Macedon.* (Dig. 14. 6.) and because just as no one ought to be ignorant of the condition of him with whom he contracts, so also neither of the condition of him before whom he contracts and passes an act, *l. qui cum alio 19 ff. de reg. juris* (D. 50 17.) Also, because as jurisdiction or public power cannot be given, by the pacts of private persons, to him who has it not, therefore what has proceeded from such a one would be useless, *l. privatorum 3 C. de jurisdict. omn. jud. et foro competente* (C. 3. 13.) Nor can it be given by a private, and therefore not a common, error; lest otherwise what not even consent could have expressly done, error should effect by the exclusion of that consent. But if the person was considered by all or by very many to be a drawer of public instruments, or a magistrate, it must then be seen whether he obtained the title of magistrate or drawer of public instruments from those who have the power of creating such,

although there was a legal impediment in him created, so that he could not be created: or whether such an office was never truly given to him. For if it was only commonly *believed* that he had been appointed as such, whereas it had not happened in reality, this mere common error of all, or of most, private persons cannot constitute one, who is it not, a drawer of public instruments or a magistrate; for this reason that individuals erring privately are nevertheless to be considered as individuals, nor can they be taken collectively, since they did not do any common transaction in error, and no common error of theirs is apparent. Thence, although all may have erred, all yet are taken as individuals and private persons. The reason above adduced from *l. 3 C. de jurisdiction. omni. jud.* (C. 3. 13.) has also force here. And certainly if only this common error were sufficient for the validity of what was done, the Emperors would not so much claim it as a mark of their liberality that a testament should be upheld, one of the witnesses to which, in addition to other suitable witnesses, was a slave who was believed, according to the opinion of all, to be free, § *sed cum aliquis* 7 *Instit. de testament. ordinand.* (Inst. 2. 10.) Nor is it repugnant to this that error is said to make law, in *l. suppellectili* 3 § *ult. ff. de supell. leg.* (Dig. 33. 10.) and that the exception founded on the *Senatum Consultum Macedonianum* ceases if any one had lent money to him who, not on an empty opinion, but in the belief of most persons, was thought to be the father of a family, *l. si quis* 3 *ff. de Senatusc. Maced.* (Dig. 14. 6.) For in *d. l. 3 de suppellectili legata*, the common error of the people as to the signification of a word is said to make law, because it is known that words have force, not by public authority, but by popular use. And that anyone is a *paterfamilias* or a *filiusfamilias* depends more on the will of private persons, on fortune, on death, and other accidents, even if there be no added public authority: so that, therefore, the common opinion of the people more readily excuses one who errs, and thus gives credence. But if anyone were appointed to the office of a drawer of public instruments or a magistrate, by those who had the power to make him so, but who, owing to a common error, did not know of an impediment which either made the appointee incapacitated from the beginning, or which caused him to become unsuitable after the office had originally been rightly conferred, then he who knowingly aspired to the office, or retained it contrary to law, is to be punished with a fitting punishment, *l. Praes. 2 C. si servus aut libertus ad decurionat. aspiras.* (C. 10. 32.); but yet everything done before such drawer of public instruments or magistrate nevertheless remains unshaken, on equitable and humane principles, whether it have been done merely by those who were ignorant of, or even by those knowing of the impediment, for perhaps it was but known to few. And this approval is not on account of a common error, but on account of a signification or election, and a subsequent tacit approbation, on a discussion of the error, of those who have the power of electing or approving, as was before said, agreeably to *legi tertinae ff. h. t.* (Dig. 1. 14.) Vide Jacob Gothofredus libello singul. ad *d. l. 3 ff. h. t. num.* 13, Zozius ad *Pandect h. t. Besoldus delibet. juris ad Pand. libr. 1. num.* 47, pp. 152, 153.

7. But since it is the custom with us that drawers of public instruments are not only approved as suitable by the Counts of each province, or by those representing the Counts in the provincial courts, but as they were moreover nominately admitted by the magistrate in that town or place where they were about to exercise their practice, a double

doubt can thus remain: the first of which is whether instruments are of effect as public instruments, which are drawn up by them beyond the province by the Counts or Princes of which they were approved and armed with public authority. The other doubt is whether the instruments are valid which have been drawn up by them within the province of him who clothed them with public authority, but yet in another town or place than that in which they had obtained permission to carry on practice. With regard to the former doubt, it seems that it should be laid down that in no way does an instrument deserve faith or authority which, for example, a drawer of public instruments, who was confirmed by the Counts of Holland, had drawn up on Ultrajectine or Frisiau soil; or which one, admitted in Gallia, had drawn up in Belgium. That such an one is regarded as a public person, and that his acts so merit public confidence like other instruments publicly entered on the records, is founded on no other reason than the power of the conceder, who, just as he as Princeps can bestow public credence, can also bestow the same power on persons of proved good faith. And as it is evident that he who gave this power to the drawer up of public instruments is himself regarded as a private person if he go out of his territory, *l. ult ff. de off. praelect. urbi* (Dig. 1. 12.) *l. Praeses provinciae in suae* 3 *ff. de offic. praesidis* (Dig. 1. 18.), it would be perfectly unreasonable that he should give to another what he had not himself, that is to say, the power of bestowing the public faith in a place where, if he were there himself, he would not be able to secure the public faith, *Contra l. nemo plus* 54 *ff. de reg. juris* (Dig. 50. 17). Nor will you sufficiently advance to the contrary hereof that the making of such instruments by a drawer up thereof belongs to the "voluntary jurisdiction" which it is permitted to exercise even beyond the limits of the territory, *arg. l. omnes* 2 *ff. de offic. procons. et legati* (Dig. 1. 16.). For not only is the exercise of such an office as that of drawer up of public instruments not, with aptness, sufficiently compared with a voluntary jurisdiction, but it should moreover be considered that not even this voluntary jurisdiction can be exercised by a proconsul beyond his jurisdiction, according to *d. l. 2.*, unless it have been given him by the people or the Princeps having authority over all the provinces: for every governor has the highest rule in his own province, but only after the Princeps, *l. et ideo* 8 *ff. de offic. procons. et legati* (Dig. 1. 16.) Which is not so in the case of those drawers up of public instruments of whom we are now speaking, and who belong to different provinces and kingdoms, not obeying one chief Princeps. Boerius *decis* 242, *Paulus Voet de Statutis* sect. 4 *cap. 4, num. ult.* As regards the other question put,—viz., whether if a drawer of public instruments created by a Princeps or provincial court, and admitted in one town of that province, draws up an instrument in another town or village of the same province, where he had not obtained permission to practice it, is deserving of public faith,—I find there is a variety of opinion. For though, according to the Constitution of Charles V., 21 *Martii*, 1524, vol. 2 *placit. Holl.* pag. 1381, *in fine*, it was prohibited to give judgment on such instruments, or to give any weight to them in deciding,—afterwards, however, that strictness seems to have been departed from, since in the year 1608, 22 *Nov. d. vol. 2, pag. 1457, in pr.*, it was decreed by the Counts of Holland that it should be inserted in the instrument creating such officers that they should not exercise their calling in any town or district of Holland, unless having previously obtained the written consent of the magistrates or rulers; but

no penalty of nullity is found added. Nor will you rightly suppose that any penalty should seem to be understood: for the prohibiting words are not directed against those who contract or do the act, but against the drawers up of these public instruments themselves: and a penalty of nullity would not recoil on the drawer doing what was forbidden, but upon the head of the private parties themselves. Nor is it probable that the Counts would have either wished to diminish the power of the court over the whole province, or the faith of the drawers confirmed by the approval of the court, by denying force to instruments drawn up within the province; but it is rather to be supposed that they should have determined to study the honor and authority of the magistrates and rulers of every town and district, and that they would have wished to guard that the alien scythe of strangers should not mow down their harvest,—strangers who perhaps had guaranteed their faith and skill, to a lesser universitas of men, *Jacob Caren observ. 37, Henric. Kinschot responso 49, Groenewegen ad Grotium manu duct. ad jurisprudent. Hall. libr. 2, cap. 17, num. 8, Imbertus Instit. Forens. libr. 1, cap. 70, num. 2, ibique in notis.*

8. It is clear that the urban Prætors nowadays have scarcely anything in common with the Roman Prætors, nor are they judges, but rather more eminent ministers of justice, similar to our advocates of the fisc, and therefore the accusers in delicts, present at examinations and questionings of prisoners: in some places they are even, as it were, the directors of the college of judges. *Vide Christnaeum ad Leg. Mechlin. tit. 1, art. 1, num. 6, Groenewegen ad l. 2, C. de custod. resum. et ad l. 12 ff. de public. judic., Paulus Voet ad § 7 Inst. de jure nat. gent. et civil.*

Title XV. treats of the office of the Præfect of the Watch.

Title XVI. „ „ „ „ Proconsul and Legate.

Title XVII. „ „ „ „ Augustal Præfect.

Title XVIII. „ „ „ „ Presidents of Provinces.

Title XIX. „ „ „ „ Procurator of the Emperor.

Title XX. „ „ „ „ Juridical assistant of the Augustine Præfect.

Title XXI. „ „ „ „ of him to whom jurisdiction is committed
(See Title on Jurisdiction; post.)

Title XXII. „ „ „ „ of the Assessors to the higher Magistrates.

[All which, not being of present application, is not translated.]







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JOHANNES VOET,

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HIS COMMENTARY ON THE PANDECTS:

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CONTROVERSIES OF THE ROMAN LAW, THE MODERN
LAW IS ALSO DISCUSSED, AND THE LATEST
IMPROVEMENTS IN PRACTICE.

PART II.

(JURIS.)

VOL. I. BOOK II. (TITLES I. pp. 39-110).

ON JURISDICTION.

TRANSLATED BY:

JAMES BUCHANAN,

ESQUIRE, AND ATTORNEY-AT-LAW IN SCOTLAND, AND ADVOCATE IN ABERDEEN.
LONDON: 1794.

LONDON: J. D. JONES.

LL.

P. S. T. JONES
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BEING

VOL. I Bk. II. (TIT. I. pp. 89-110).

ON JURISDICTION.

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CAPE TOWN: J. C. JUTA.

1880.



LONDON :

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BOOK II. TIT. I.

ON JURISDICTION.

SUMMARY.

1. What "jurisdiction" is, in the narrower and wider sense of the word? who have it, and who have it not? and in what respects "*jurisdictio*" is to be distinguished from "*notio*." In its widest sense it is the public power of adjudging and executing in civil and criminal cases. Exercised by Senate and Princeps. Arbitrators have it not, for they cannot execute.
2. What pertains to mere "*notio*"? By the later law even magistrates adjudicating and doing what were commonly matters of "*notio*," did so by force of jurisdiction, *e.g.*, oath, valuation of destroyed goods; judgment on confession, equal to proof; ordering securities; ordering deposit of thing in litigation. But if they commit them to judges designated by Justinian, the latter acted by the "*jure notionis*," and not "*jure jurisdictionis*."
3. Jurisdiction is, (a) *voluntary*; (b) *contentious*. For (a) the assent of both parties is essential; for (b) the dissent of either; although (b) sometimes has place where both sides consent, *e.g.*, divisory actions. Differences between (a) and (b): (a) needs no tribunal, time, place; is exercised on holidays, and for oneself and out of one's province.
4. Some acts, however, are intermediate, and cannot properly be referred to either voluntary or contentious jurisdiction, *e.g.*, giving tutor; decree as to alienation of ward's goods; compromise as to testamentary aliment; registration of donations; opening will; tender of money in Court. Yet even these, if a hearing is necessary, or discretionary right given, are more contentious. Where no opponent, or may be done in holidays: more voluntary.
5. Jurisdiction is also either (c) *civil* or (d) *criminal*. Criminal jurisdiction often called "*merum imperium*."
6. The third division of jurisdiction is either (e) *ordinary*, *i.e.*, by original magisterial law, or by custom, or (f) *extraordinary or legal*; flowing from a specific law. Examples given of (f): *viz.*, criminal jurisdiction; appointment of tutor; decree as to alienation of ward's goods; compromise as to testamentary aliment. To be competent by the original law of the magistrate is thus different to being competent by a special law.
7. A very leading distinction is (g) *original*, (h) *derived*; (g) being what one has of his own right, and (h) by another's favour. The mandant can delegate to any suitable person, and either his whole jurisdiction or a part.
8. Such jurisdiction as is specially granted by a law cannot be delegated. Nor can criminal jurisdiction, except in case of absence, in which case the *lex Julia de vi* has made special provision for its being done.

9. It is shewn that criminal jurisdiction also can be delegated in case of illness.

Whether jurisdiction can be delegated on the ground of very long illness, is a point of doubt. Voet's opinion is yes, inasmuch as the public business suffers as much from delay caused by illness as by absence. It will be observed that he again partly founds on the statute of the *lex Julia de vi* (but see § 10). Those ill and incapable, or by law considered as virtually absent, though physically present. Sick tutors have others substituted for them, and syndics of corporations. The fact that in one case occurring in the Roman law delegation was specially prayed, on account of delay through illness, Voet thinks is no reason for concluding that no delegation could have taken place without such special prayer. And he is confident that it cannot be otherwise proved necessary. [Very rarely does Voet use this strong term, "*confido*," usually satisfying himself with the expression of his opinion, or its argument.—*Transl.*]

10. Those are wrong who confine this delegation by reason of absence to the *lex Julia de vi*. Not only can that particular criminal jurisdiction, but every other also, be delegated in case of infirmity.
11. Delegated jurisdiction cannot be again delegated by the mandatory. No magistrate can of his own will abdicate to another. And in reference to this Voet explains *l. 5. C. de judiciis*.
12. To this rule there are two exceptions: 1. A judge appointed under the Princep's autograph could delegate. These named. The reason of the exception is that they exercise an original jurisdiction. 2. Where the delegator gave special authority to sub-delegate.
13. Delegated jurisdiction is not given by law, but confirmed. The *l. pen. ff. de judiciis* elucidated.
14. Jurisdiction proceeds from (a) grant of the Princeps, (b) agreement of parties, (c) prolongation. Private pact cannot give jurisdiction to one who has no jurisdiction at all; but it may extend or "prolong" the jurisdiction of one who has it within certain limits to be agreed on.
15. Extension of jurisdiction may be to a judge knowing or not knowing it, or to one who wrongly thinks he has jurisdiction. The consent of the judge who, but for such extension, would have heard the case is unnecessary, if the Court renounced were introduced for litigant's own benefit. If otherwise, it is.
16. Such extension is also rightly made by the lesser magistrates, and by mandataires of the jurisdiction; provided the jurisdiction has been generally delegated to them, and not merely one act. In which latter case the general rule of law of mandate holds; viz., that the terms of a mandate cannot be exceeded.
17. Such extension cannot be made by colleges, to whom only certain causes are delegated; nor by privileged Courts.
18. It can be made by tacit consent, as well as express. Tacitly by both parties knowingly and wittingly going to a judge who has no jurisdiction (to save a double trial); or by the similar course followed unknowingly and in error, provided *litis-contestatio* had taken place before a judge to whom jurisdiction could competently be prorogated. The law then implies consent from the *litis-contestatio*, for there can be no exception to the jurisdiction after *litis-contestatio*. That is an initial objection. *L. 4 of the C. h. t.* explained.
19. Objections to the preceding view answered. One objection is that, as a general rule, what is done by an incompetent judge does not bind. We must therefore here inquire whether the deciding judge had no jurisdiction at all, or only no particular jurisdiction. If the former case, all done is null; but not so in the latter, if there has been consent, or *litis-contestatio* in error.

Sentences even *ipso jure* null must nowadays be appealed from, unless the defect proceeds from want of jurisdiction.

20. If a plaintiff call an unwilling defendant to a judge incompetent specially, but who could prorogate, the defendant would not be taken as prorogating the jurisdiction, unless he *litis-contestata* (See 22).
21. An arrested person does not, by giving security, prorogate the jurisdiction. Security he gives only to secure liberty, and for nothing else. And where the action is incompetent there the declinatory exception may be pleaded, notwithstanding the giving security.
22. But if the defendant demand security from the plaintiff, or prays time, he acknowledges the Court, and cannot again declare it. He must plead the declining exception alone. If with other pleas, it is futile. If dilatory exceptions admitted, he can, when their time has elapsed, be re-arrested for the same cause.
23. A plaintiff who has called a defendant to a competent judge, or even to a non-competent one, cannot then, the defendant being unwilling, transfer the suit to another forum, although the defendant has not yet contested the suit with the plaintiff. Although the contrary be anywhere said to be the practice of the Court.
24. Voet justifies this his view by argument against the contrary argument that if a plaintiff can change, or at any stage withdraw, his suit, so also he can change Court. The one thing he shews is not the necessary consequence of the other.
25. He is not considered to have prorogated the jurisdiction who brought a suit, on the compulsion of the prætor, or excepted to an incompetent judge. Unless it was a case where he could have appealed on account of such compulsion and did not. Non-appeal or non-appearance bars, unless the want of jurisdiction was very evident, in which case the sentence is unjust and of no effect.
26. Where there is a pact not to except to a Court it must be adhered to; and if defendant then still pleads incompetent Court plaintiff can reply "the pact" not to take advantage of such incompetency. Nor in Voet's opinion is Africanus' opinion in *Dig. 2. 1. 18.* opposed to this. An attempt made by some to reconcile *l. 18, ff. h. t. (D. 2. 1.)* and *l. pen. C. de pactis (C. 2. 3.)* is mentioned by Voet, but disapproved of. A judge already had recourse to can be departed from by mutual consent. An arbitrator can be had recourse to, and departed from to a judge, and that judge again left, by common consent. If a defendant deliberately omit taking the exception of incompetent Court, the judge rightly proceeds to adjudication.
27. Voet proposes his own reconciliation of these passages [see his own concluding words at the end of the paragraph in text].
28. A prorogation made by pact binds the heirs of the prorogant. Reasons stated: (a) heir succeeds to deceased's *persona* and rights; (b) everyone contracts for heirs as well; (c) heir must be summoned where deceased should be. In the case of an Ultrajectine, however, the opposite rule prevailed.
29. The widow of a prorogant, and her second husband, is bound by the law of the marital power, by the act of her deceased husband, according to our modern law. But not according to the law of the Ultrajectines.
30. It is a point of doubt whether a surety is bound by the prorogation of his principal, unless it were expressly agreed in the deed. Voet is of the negative opinion, differing from Van Leeuwen, who says there is a decision of the Court to that effect. Voet shews that this decision is based on exceptional reasons, stated in the judgment. Voet's reasons are: 1. Simple surety not necessarily cited to principal's domicile; 2. Suretyship being of strict law, what is not expressed

- is not understood; 3. Surety keeps privilege of own forum, even where he is surety for a principal already elsewhere sued; 4. Surety elsewhere resident is not considered a suitable surety, unless he renounce his own *forum*; and can be rejected on that ground.
31. A general prorogation suffices unless a special one is desired by statute, which necessity has been laid down by the provincial Courts of Holland and certain other regions, but is unnecessary in other intermediate tribunals of Holland. In the ultrajectine Courts a general formula suffices.
 32. Prorogation is of no force if made by one who neither is in the territory, nor has goods there. If he is in the territory he is bound to appear on a mere citation, without apprehension of goods or person.
 33. Prorogation considered with reference to *place, time, persons, and things*, which are the four limits of jurisdiction. First as to *place*. There can be no prorogation as to place. No magistrate can pronounce judgment out of his territory even by consent of parties. Out of his territory he is but a private person.
 34. Nor in respect of time. A magistrate whose time is up must give way to successor, and is thereafter only a private person. Only one exception, stated in text.
 35. But in respect of persons it can be. They can consent to another jurisdiction. And in respect of quantity. They can consent to excess. Only one exception, stated in the text.
 36. Certain cases are stated according to modern law in which, by special law, prorogation is disapproved, as in the case of insurance. In other cases, there were amounts (stated) below which jurisdiction could not be prorogated.
 37. In criminal cases prorogation is mostly in vain, for as to crime there is no privilege of place, dignity, or Court.
 38. Jurisdiction granted includes the grant of whatever is needed for exercising it, *i.e.*, "*imperium*," or the power of ordering, forcing, and coercing. This is present even in acts of voluntary jurisdiction, *e.g.*, adoption, divisory and other judgments by consent.
 39. This "*imperium*" is either pure or mixed. Pure, is correction of criminals; including death both natural and civil. Can only be exercised by those who have the legal right, and cannot be delegated. Does not include the infliction of pecuniary fines.
 40. "*Merum imperium*" does not consist only in punishment, but in trial, &c. In civil cases there is room for compromise, payment, arrangement with your adversary. But in criminal cases not; all goes by force and compulsion.
 41. Roman municipal magistrates had not "*merum imperium*," but only the higher magistrates. By our law all magistrates have. The provincial Courts of Holland, however, do not exercise it in their own names, but of the Courts.
 42. *Mixtum imperium* also has the authority of executable jurisdiction. To it belong nomination of judges, forcing judges to adjudicate, *restitutio in integrum*, compelling to give securities, execution, judicial sentences, taking pledges, fines, civil imprisonment.
 43. *Imperium mixtum* is really distinct in its nature from jurisdiction, although it is true some things partake more of the one than of the other.
 44. Voet goes on more fully to shew by argument that mixed *imperium* is distinct from jurisdiction.
 45. Jurisdiction is often now-a-days considered as something patrimonial and passing by succession, &c.; is divided into highest, middle, and lowest. By what legal remedies it is defended, and who have treated of it at length according to modern usage.
 46. Jurisdiction is exercised over those who are subject by reason of being, or having goods, in the territory. One pronouncing judgment beyond his territory, or

on those set in his territory and having no goods there, may be disobeyed with impunity, and he or his officers using force may be lawfully resisted with force. Jurisdiction at commencement of suit is sufficient; departure during it does not matter.

47. Cases are cited, however, both in the Roman law and our law, where judgment is pronounced over him who is not in the territory, or in the territory of another magistrate with his special consent; *e.g.*, in favour of liberty, or by special concession and accord.
48. A judge cannot exceed his jurisdiction where it is limited as to quantity; if he does the judgment will be *wholly* null. In reckoning quantity you must go by the summons and not what is owed.
49. When many quantities are prayed for by separate actions, which quantities, singly, do not exceed the jurisdiction, but do so when lumped together, the amount of the single action is viewed, and there is thus no excess of jurisdiction, unless the course is the same, *e.g.*, many years interest on one capital; or it be a case of partners, whose single shares are not above the jurisdiction, but the total interest is; or a case of divisory actions where this last principle also holds.
50. No one can pronounce judgment in his own cause, nor that of relatives and servants, lest affection should sway him. Nor can corporations and mercantile associations (*e.g.*, East India Company), where their privileges by charter are alleged to be violated.
51. But he can pronounce judgment if the adversary consent. A father can be arbitrator for his son, then why not also a judge by consent? A prætor, too, if there is any doubt as to his jurisdiction can decide the question himself. And the Princeps, being the fountain of law, and acknowledging no superior, must of necessity be his own judge. Instances are cited in which the Princeps has so adjudicated in his own personal cause.
52. An equal cannot therefore exercise jurisdiction over an equal or superior in matters of voluntary jurisdiction. In contentious jurisdiction he can, if there is a submission to his authority. Where two have an undivided jurisdiction, one cannot punish the other, but must remit to a superior. But an inferior magistrate can, in his own territory, exercise those who are of superior jurisdiction elsewhere, but litigate or criminate themselves within his territory; for there they are but private persons. So also as to their officers unless it is otherwise agreed by convention.
53. How jurisdiction is proved. Voet refers the student on this point to Mascardus, where cited. If two neighbouring bailiffs wish to litigate as to their confines of jurisdiction, they must do so at their own, and not at the public expense, unless ordered by higher authority to litigate.
54. Jurisdiction ceases with the death of the person to whom it was granted, whenever it is a personal jurisdiction. Also by the death of his mandant before execution. For *such* jurisdiction does not continue in the mandatories. But patrimonial jurisdiction does pass and continue. Jurisdiction ceases also by lapse of time. And by abdication of office, with the Princeps's consent, but not without it.
55. And by the revocation of the grantor, where the ordinary mandant revokes, or the Princeps appoints another magistrate before the lapse of the time of the first. A Roman magistrate who did not leave the province on his successor's appointment was considered guilty of high treason. Patrimonial jurisdiction is also revoked for grave abuse. By decisions, the heirs were allowed, however, to use it after the abusing ancestor's death.
56. Jurisdiction being introduced by prescription, also ceases by prescription.
57. To protect the jurisdiction, there were different Roman prætorian edicts: *e.g.*, *De*

albo corrupto, whereby those who wilfully (not from rusticity) broke the prætorian tablets were fined or chastised. Where several broke, the fine-payment by one did not release the other, even if they were all members of one family. But it did if a whole family only advised. The adviser as well as the breaker is liable. The action may be brought by any one of the public. By modern law punishments for such offences are arbitrary. Those, therefore, who wilfully take down public notices from the doors, &c., of Courts, *e.g.*, edictal citations and public announcements, are extraordinarily punished at the discretion of the judge. Even an owner whose goods are wrongly publicly proscribed cannot tear the public notice down, but must interfere at the sale. But if my goods are thus wrongly proscribed by private authority, I can pull the notice down. Just as I can remove marks privately put on my goods but not by judicial authority.

1. "JURISDICTION," has received different descriptions according as the word has been broadly or narrowly accepted by interpreters. Those who call it the cognizance (*notio*) or power of adjudging and executing causes competent by the right of the "magistrate," have thus defined, in its strictest sense, that jurisdiction which is opposed, in *l. muto* 6, § *tutoris* 2, *ff. de tutelis* (D. 26. 1.), to the jurisdiction nominately given by law, by the Senate, or the Præceps. Those who called it "the power of adjudging, and executing judgment, in civil causes," regarded jurisdiction in a broader meaning, so that, besides that jurisdiction which is competent by the right of the magistrate, it includes also that which is conceded by a special law, by a senate-consult, or by a constitution, and thus opposed to "*merum imperium*," *i.e.* the power of the sword for the correction of evil-doers, also called *potestas* [criminal jurisdiction, see § 5, § 39—*Transl.*], as in *l. imperium* 3, *ff. h. t. d.* (D. 2. 1.); *l. cui eorum*, *ff. de postulando* (D. 3. 1); *l. cum hi* 8, § *sed nec mandare* 18, coupled with *pr. ejusdem l. ff. de transaction.* (D. 2. 15.). But taken in its widest signification, it may be described as "the public power of adjudging and executing causes, whether civil or criminal," or even "the cognizance competent to a magistrate, with the power of decreeing and executing, whether ordinary or given by law": *l. si in aliam* 7, § *ult. l. 8, l. 9, ff. de offic. procons. et legat.* (D. 1. 16.). *l. 1, ff. de offic. ejus, cui mand. est jurisdictio* (D. 1. 21.) Also D. Noodt, *de jurisdictione*, *libr. 1, cap. 1.* That this "public power" might also have rested with the Senate is clear from the argument in *l. 1, § 2, ff. a quib. appell. non licet.* (D. 49. 2.), and with the Præceps; for he who is clothed with the power of creating magistrates and giving jurisdiction, cannot be himself destitute of jurisdiction, argued in *l. unica in pr. ff. ad leg. Jul. de ambitu* (D. 48. 14.); and that the Roman *principes* often laid down the law in their leisure moments is beyond doubt, according to the decrees of the Præceps, by Suetonius, Tacitus, and others. See *l. proxime* 3, *ff. de his quæ in test. delent.* (D. 28. 4.). Inasmuch as arbitrators elected by the mutual promise of parties to abide the award, are wanting in this "public authority," therefore they have neither jurisdiction nor cognizance (*notio*) properly so called: again

petty judges (*judices pedanei*) have no jurisdiction, but only “*notio*,” or power of cognizance merely; for they are wanting in the right to execute, since the magistrates themselves execute the judgments of such judges appointed by them: *l. a Dio Pio* 15, *in p. ff. de re judicata* (D. 42. 1.), *l. ult. C. ubi et apud quem cognit. in integr. restitut.* (C. 2. 47.). That the word “*notio*” has a broader signification than the word “*jurisdictio*” is beyond doubt, since “*notio*” includes both “*cognitio*” and “*jurisdictio*”: *l. notionem qq. ff. de verbor. signif.* (D. 50, 16), and pertains even to those who have no jurisdiction (*l. ait prætor* 5, *ff. de re judic.* (D. 42, 1), *l. ult. C. ubi et apud quem cognit. in integr. restitut.* (D. 2, 4), so that it may be considered a genus, comprehending jurisdiction under it, and opposed to jurisdiction “*cognitio*” or simple “*notio*.” And as “*jurisdictio*” applies not merely to civil but to criminal causes, as will be shewn by many examples, it is not surprising that civil jurisdiction is often designated by the expression “*notio*”: *l. ult. in fine ff. de oblig. et act.* (D. 44, 7.); *l. cum hi* 8, § 1, *ff. de transact.* (D. 2, 15.); and that also criminal jurisdiction falls under it, as in *l. § initio* 4, *ff. de officio præfecti urbi* (D. 1. 12.), *l. ex omnibus* 10, *ff. de offic. præsidis* (D. 1. 18.)

2. Moreover, simple “*notio*” consists in the bare power of taking cognizance and adjudging, the execution being left to those who have “*jurisdictio*.” *d. l. 15, ff. de re judic.* (D. 42. 1.); *d. l. ult. C. ubi et apud quem cognit. in integ. restit.* (C. 2. 47.) To it belongs whatever is necessary to aid the cognition and decision of cases. Such as, for instance, to administer an oath for the purpose of eliciting truth in doubtful cases: *l. admonendi* 31, *ff. de jurejurando* (D. 12. 2.): to assess the value of things in litigation destroyed by fraud or blame, to be paid by the defendant:—or to allow the plaintiff, after taking solemn oath, himself to declare the valuation of the thing brought into judicial question, whether such value be the real or fancy value (*ex affectione*), in respect to the measure of fraud or blame, or the nature of every case, *l. videamus* 4, *et tol. tit. ff. de in litem jurando* (D. 12. 3.); to exclude the necessity of plaintiff's proof wherever the defendant has confessed, such confession being mostly taken as enough for judgment: *l. 1. l. pen. ff. de confessis* (D. 42. 1), *l. proinde* 25 *in fine ff. ad leg. Aquil.* (D. 9. 2.):—or when he on whom the burden of proof lay has allowed the time prescribed for proof to pass by; as in *l. 1. C. dedilationibus* (C. 2. 12.), to order the giving of security, whether by way of judicial securities or common securities, whenever the judge has decreed the latter to be taken during the pendency of the suit, § 1, *et ult. Inst. de divisione stipulation.* (I. 3. 18):—to order that the thing litigated about shall, after the lawsuit is contested, be deposited in a sacred building until security be given: as, for instance, when the judge, dividing a family inheritance, decrees that the joint hereditary documents should be deposited in a sacred building until one of the heirs shall, on giving security, take their custody upon himself: *l. si quæ sunt* 5, *ff. famil. ercisc.* (D. 10, 12.) If before the

contesting of the lawsuit the prætor has ordered the deposit of a movable, on account of security not having been given to await judgment, until such security shall have been given, you would certainly refer this act to the exercise of "*jurisdictio*" rather than simple "*notio*," inasmuch as it has been interposed by him who presided with jurisdiction: *l. si fidejussor* 7, § *ult.*, joined to *l. 5*, § 1, *ff. qui satisd. cog.* (D. 2. 8.): § *sed hodie* 2. *Instit. de satisfactione.* (I. 1. 24.). And inasmuch as the præsides were ordered by Diocletian and Maximian to take cognizance and adjudicate, themselves, the discretionary power of appointing subsidiary judges being left them to them only on account of very serious impediments arising: see *l. placet nobis*, 2 *C. de pedan. judicib.* (C. 3. 3.) all such acts performed by the magistrate himself as if of his own jurisdiction, and not proceeding from a mere "*notio*," I think should be referred to "*jurisdiction*." Compare *Vinnius' Treatise on Jurisdiction*, cap. 5. num. 2., and thence arises the heading of that title in the Code by which jurisdiction is given to all judges, viz.; the heading concerning the jurisdiction of all judges and what is a competent forum. And I think that the old law and the bare "*notio*" without jurisdiction continued even to the time of Justinian, whenever on account of the press of business or any other just cause, judges were appointed by the magistrates, by prescript: *d. l. 2*, et *l. ult. C. de pedan. judicibus* (C. 3. 3.), et *ex novello* 82. cap. 1. et *seqq.*; for although specified persons were designated by Justinian as those to whom cases were to be referred by the magistrates, yet it is more correct to say that those thus appointed had, like the old petty judges, only the power of taking cognizance of cases and adjudicating them, but not of executing: since you will nowhere find in the said *nov. 82* that a right to execute was given them, or that any innovation was made in this respect; nothing else is anywhere enjoined than that they should hear and examine cases, and decide them by themselves absolving or condemning; moreover, just as by the old law, appeal lay from those thus appointed to those who appointed them: *d. nov. 82*, cap. *illo* 4. 5. Nor were specific persons so designated for any other reason than that no one who was inexperienced in law and practice should be appointed: *d. nov. 82 in præfqt.* No change was in any way caused by the designation of specific persons made by the constitutions of Zeno and Justinian, because even of old the choice was not promiscuously made, but the prætor only drew from five *decuriæ* of judges, and therefore selectly; as with many others, D. Noodt teaches, *de jurid. libr. 1. cap. 13. in pr.*, unless where of old the magistrates appointed a petty judge, by the authority of the Princesps, and specially named in a particular rescript issued to the magistrate, *l. ult. ff. quis a quo appell.* (D. 49. 3.); *l. 1*, § *si quis* 3, *ff. de appellat.* (D. 49. 1.)

3. To whom jurisdiction is competent, and what jurisdiction is competent to each one who has jurisdiction, we cannot sufficiently comprehend, unless we first enumerate the different kinds of jurisdiction, and its different divisions. The most general division is, that jurisdiction

is either *voluntary* or *contentious*. The former is exercised between those who are willing, as adoption, manumission, emancipation. If, however, it be decreed where either party is unwilling, it will become a contentious jurisdiction, without doubt, as in the instances *l. nonnunquam* 32, *ff. de adoption.* (D. 1. 7.); *l. si cui legatum* 92, *ff. de condit. et demonstrat.* (D. 35. 1.). Contentious jurisdiction is that which can be exercised between those who are unwilling, the cognition of the case taking place: *l. omnes* 2, *ff. de offic. procons. et legati* (D. 1. 16.); even if, in fact, it does not always take place between those who are unwilling, but even now and then between those who are willing, especially in divisory suits, where any one, wearied of joint-ownership, hastens to the judge, together with his adversary, contends for a separation, and, when judgment is given, eagerly longs for the effect and execution of the division and adjudication: *arg. in tribus* 13, *et l. 14, ff. de judiciis* (D. 5. 1.): it being thus sufficient that the power of compelling is there, in case any one of the parties wishes to resist and be refractory. To this end tend all the actions, and those which have the form of actions, enumerated in *l. actionis* 37, *ff. de oblig. et action.* (D. 44. 7.). Voluntary jurisdiction differs in many ways from that which is contentious: thus it does not need a tribunal, but is exercised in every place and time, and even on holidays: *l. actus* 8: *C. de feriis et pen.* (C. 3. 11.). *Instit. de libertinis* (I. 1. 5.); nor is it any objection that one lays down the law for himself and his: *l. 1. 2, ff. de officio prætor* (D. 1. 14.); *l. si consul* 3 *et* 4, *ff. de adoption.* (D. 1. 7.); *l. si rogatus* 20, § *ult. ff. de manumiss. vind.* (D. 40. 2.); *l. un. § ult. ff. de officio consulis* (D. 1. 10). It can even be exercised by a proconsul who has not yet entered his province, *l. 1. 2, ff. de offic. procons. et legat.* (D. 1. 16.): all which would otherwise fall under the acts of a contentious jurisdiction: *d. l. 1. 2, ff. de offic. procons. et leg.* (D. 1. 16.), *l. qui jurisdictioni*, 10, *ff. h. t.* (D. 2. 1.) *d. l. actus* 8; *C. de feriis* (C. 3. 12.)

4. It must be known, however, that there are some things which you will neither *wholly* refer, with sufficient aptness, to voluntary, nor to contentious, jurisdiction; but which seem to stand as it were between both. Such are, the giving of a tutor, the arrogation of one below the age of puberty, manumission under the second chapter of the *lex Ælia Sentia*, the interposition of a decree as to the alienation of the goods of a ward, compromise as to future aliment left by testament, the registration of donations, the opening of a will, the tender, consignation, and deposit of money in court, and the like. In so far, however, as even in these either a cognition of the case is necessary, or what is prayed is not always granted, or where these things are, not of sufficient right, done by a judge, in his own cause, they more resemble contentious jurisdiction. In so far, however, as neither an adversary nor a direct contradictor usually intervenes in these proceedings, nor holidays are regarded as obstacles to their performance, *arg. l. 2, ff. de feriis* (D. 2. 12.), they resemble acts of voluntary jurisdiction.

5. Again jurisdiction is either *civil*, exercised concerning civil causes, or *criminal*, concerning criminal causes. And although the latter more frequently falls under the appellation of "*merum imperium*," of which hereafter [and *ante*, § 1—*Transl.*], yet it is comprehended under the widest name of "jurisdiction;" for from the reason that a proconsul had "fullest jurisdiction," Ulpian gathers that the functions of all who give judgment at Rome, whether as magistrates, or extraordinarily, appertain to the proconsul, and that there is nothing in the province which cannot be done by him: *l. si in aliam* 7, § *cum plenissimam* 2, *l. 8. l. 9. ff. de offic. procons. et legat.* (D. 1. 16.). And Arn. Vinnius reasons in vain when he would restrict Ulpian as treating only of civil causes in *d. l. 7; tract. de jurisdict. cap. 1. num. 1.* For as it is there said that the proconsul exercised the functions of all who gave judgment at Rome, it necessarily follows that that includes the functions of the præfect of the city, who, as the same Ulpian asserts, claimed jurisdiction in all crimes: *l. 1. in pr. ff. de offic. præf. urbi.* (D. 1. 12.) Except that magistrates are said to err, who "when they have the exercise of a public prosecution, as that of the *lex Julia de adulteriis*, delegate their jurisdiction to another: *l. 1. ff. de offic. ejus cui mand. est jurisdict.* (D. 1. 21). Moreover, "to give judgment" concerning the life of a Roman citizen, or concerning a parricide, is a phrase known to Suetonius and to Pomponius the jurisconsult: *Sueton., in vita Augusti, cap. 32. l. 2; § et quia* 28, *ff. de orig. Juris* (D. 1. 2.); *Adde D. Noodt de Jurisdictione, libr. 1. cap. in fine; Vinnius d. cap. 1.*

6. Again jurisdiction is either *ordinary*, which is competent to any one by the law of the magistrate, or by ordinary law and custom handed down by our ancestors; or *extraordinary* or legal, which does not flow from the law of the magistrate, but is conceded by a special law, senate-consult, or constitution of the Emperor. Ulpian fully proves this division when he says of the proconsul, that he exercises the functions of all who at Rome declare the law, whether as magistrates, or extraordinarily: *l. si in aliam* 7, § *ult. ff. de off. procons. et legati* (D. 1. 16.); although sometimes that there is jurisdiction may be denied in the laws, for, in the narrower sense of the word, "jurisdiction" only includes that which is competent by the law of the magistrate, and is opposed to that which is given by a special law: as in *l. tuto* 6, § *tutores* 2, *ff. de tutelis* (D. 26. 1.), et *l. 1. § 1, ff. de offic. ejus cui mand. est jurisdict.* (D. 1. 21.); to the latter belongs criminal jurisdiction: *l. 1. ff. de off. ejus cui mand. est jurisdictio* (D. 1. 21.), the appointment of tutor, *l. tuto* 6, § 2, *ff. de tutelis* (D. 26. 1.), added to *l. cui eorum* 3, *ff. de postulando* (D. 3. 1.): *l. si quis* 3, § *sed etsi* 5, *ff. judicatum solvi* (D. 46. 7.), making a decree as to a compromise concerning aliment given by last will: *l. cum hi* 8, *ff. de transact.* (D. 2. 15.), or as to alienation of the goods of a ward, *l. 1. ff. de reb. eor. qui sub tut. vel cura* (D. 27. 9.), joined *l. mandata* 2, § 1, *ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.), or as to a manumission made by a minor of 20 years old, § *eadem* 4. *Inst. quib. ex caus. manumitt.* (I. 1. 6): the power of a provincial magistrate to appoint

a judge: for urban magistrates did not acquire this right by any special law, but by authority of their office, and, therefore, by the law of the magistrate: *l. cum prætor* 12, § 1, *ff. de judiciis* (D. 5. 1.). But those things are competent by the law of the magistrate, which first led to the introduction of the dignity and power of such magistrates for the use of the people and the republic, and which, by the lapse of time, and the tacit use and sufferance of the people, became so incident to that dignity, without any special law being passed, that such magistrates and their successors in office performed acts of this description by, as it were, the custom of our ancestors, although changed from time to time in some respects by the, as it were, tacit custom of the people, whence jurisdiction is said to be delegated by the custom of our ancestors, a judge appointed by the urban magistrate, and the like: *l. more* 5, *ff. h. t.* (D.), *l. cum prætor* 12, § 1, *ff. de judiciis* (D. 5. 1.), *l. 1, § 1, ff. de off. ejus cui mand. est jurisd.* (D. 1. 21.). That consuls and prætors gave judgment in towns is inherent in the first origin as it were of their dignity, and on that account it is clear consuls and prætors were created by the people: *l. 2. § cumque consules* 27, *ff. de origine jur.* (D. 1. 2.), and therefore they are said to preside in giving judgment, by the law of the magistrates, even although the olden order of judges has in many respects changed, and the habit of nominating judges has been introduced. But that they should appoint tutors to wards not having them, or do many other things having reference to legal jurisdiction, was not competent within the scope of their power, neither has such competency obtained by the custom and tacit manners of the people: but only by a new and adventitious authority from the time that, by the *lex Attilia* and other laws and constitutions, these powers were nominately given them, can they do these things.

7. Pre-eminent among other divisions, but just as involved in many difficulties, is that division by which jurisdiction is said to be either *proper* (*original*) or *committed* or *delegated* (*derived*). I call that original jurisdiction which one has in his own name, and not by the favour of another; whether he exercise it by the law of the magistrate, or by the special concession of a law, a senate-consult, or a constitution: *l. si in aliam* 7, § 2, *ff. de off. procons. et legat.* (D. 1. 16.), *l. more* 5, *ff. h. t.* (D. 2. 1.). Derived jurisdiction is that which any one exercises in the name and in the stead of him who bestowed it. So that he has no original jurisdiction who undertakes and executes a derived jurisdiction, but entirely represents another person: *d. l. 5. l. solet prætor* 16, *ff. h. t.* (D. 2. 1.), *l. 1, § 1, l. et si prætor* 3, *ff. de offic. ejus cui mand. est jurisdict.* (D. 1. 21). The consequence of which is that in regard to those things which are rightly committed to the jurisdiction of another, the mandatory can almost do the same as the mandant, as for instance to use a tribunal, to give advice, to appoint a judge: this you will find very fully confirmed by *D. Noodt de jurisdictione*, lib. 2. cap. 9, 10, 11. It is at the discretion of the mandant to whom he will commit jurisdiction (if you only

except the proconsul, as is said in *tit. de off. procons. et legati*, l. 16.): and therefore he can commit it to a suitable private person, or to another magistrate, as a prætor: *l. et si prætor* 3, l. ult. in fine *ff. de off. ejus cui mandata est jurisdict.* (D. 1. 21.): in which manner M. Æmilius the prætor, whose lot was to be abroad, delegated his jurisdiction to his colleague Attilus, urban prætor, as may be seen from *Livius*, lib. 24. cap. 44. It also depends on the will of the mandant whether he wishes to delegate his whole jurisdiction, or to appoint specific persons, or to delegate a particular branch of his jurisdiction: *l. solet* 16. et l. 17, *ff. l.* (D. 2. 1.). If he commit his whole or general jurisdiction, all that can be specially delegated will be considered as delegated, l. 1, § 1, joined to *l. pen. ff. de offic. ejus cui mand. est jurisd.* (D. 1. 21.)

8. Only that jurisdiction can be properly delegated which any one has by the law of the magistrate, and by his own right: *l. more* 5, *ff. h. t.* (D. 2. 1.); *l. 1, l. ult. pr. ff. de off. ejus cui mand. est jurisd.* (D. 1. 21.) even if the subject matter were such as that over which a petty-judge could not be appointed; for it is one thing to nominate a petty-judge, and another to delegate jurisdiction: for it is not as if the prætor decides himself when the petty-judge decides, which he however does when his mandatory of his jurisdiction decides, in the performance of the mandate: and if the law draws no distinction it is not for us to do so. It is an exception, however, that the investigation into the case of a suspected tutor, although his jurisdiction is conferred by law, can be delegated, for the benefit of the ward: *l. cognitio* 4, *ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.); *l. 1, § an autem ff. de suspect. tutor* (D. 26. 10.): as also the examination of captives, which, although it is something pertaining to "merum imperium" (see §§ 1 and 5), the proconsul delegates to his legate extraordinarily: *l. solent* 6. *pr. ff. de off. procons.* (D. 1. 16.) Except in these cases, it is well known that that which is competent by special concession of law cannot be delegated, and therefore the appointment of a tutor cannot be delegated: *l. nec mandante* 8, *ff. de tut. et cur. dat ab his* (D. 26. 5.); nor the interposition of a decree concerning a compromise as to aliment left by last will, nor concerning the alienation of wards' goods: *l. cum hi* 8, § *sed nec mandare* 18, *ff. de transactione* (D. 2. 15.); *l. mandata* 2, § 1, *ff. de off. ejus cui mandata est jurisdict.* (D. 1. 21.); nor can criminal jurisdiction: *l. 1, ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.); *l. solent* 6, *ff. de procons. et legati* (D. 1. 16). If, however, any one on whom the exercise of a public prosecution has devolved has left on a journey, he can delegate his duties, as is provided by the *lex Julia de vi: d. l. 1*: thus the prefect of the town can even delegate to his substitute, if any one were constituted as such, as if laid down by *D. Noodt de jurisdict. lib. 2. cap. 6*: it no substitute were nominated, then he can delegate to any one, as the terms are general in *d. l. 1*. In the same way as a proconsul delegated in civil cases to his adjunct legate, those not having a legate delegated even to a private stranger, as has been before said. And although it was the opinion of some that

the quæstor ought to delegate to the judge of the inquisition specially designated by the inquisitor, as is said by *Julius Polletus historia fori Romani, lib. 3. cap. 7, in addit. num. 2, Carolo Sigonio de judiciis, lib. 2. cap. 5*, yet inasmuch as the judge of the inquisition was neither by the laws nor by ancient custom joined, according to the law of public tribunals, to be inquisitor, I rather think that he to whom the exercise of the public prosecution had, for good reason, been delegated by the inquisitor, was on that account called the judge of the inquisition, so that the judge of the inquisition and the mandatary of the criminal jurisdiction was the same, and in every respect fulfilled the functions of the mandant inquisitor, even in the very drawing of lots for the judges. Whence we simply find it laid down in *l. 1. pr. et § 1, ff. ad leg. Corn. de Sicariis (D. 49. 8.)* that "he is joined to the magistracy who presides over the public prosecution, and is the judge of the inquisition," as if they were clothed with equal, although vicarious, power.

9. Whether, however, any one is allowed to delegate his authority to another, in case of very long illness, is doubtful. If one takes the words *d. l. 1*, he will consider it as strongly forbidden, since Papinian concludes there "that there can be no other delegation than if any one had become absent." But if we more narrowly consider the reason of the proposed exception, it will be agreed that it applies in the case of very long illness, as well as in the case of absence. For no other reason can be given for the *lex Julia* admitting delegation on the ground of absence, than that during the travels of the magistrates the criminal trials should not remain standing over, and the prosecution be delayed too long; for in such case they could not be disposed of with the quickness prescribed for terminating public trials (concerning which *l. de his, quos 5. C. de custod. reor. (C. 9. 4.)*), nor with that doctrine of Ulpian laid down by him in *l. meminine 10, ff. de offic. procons. (D. 1. 16.)*, "that the service of the province required that there should be some one through whom the provincial officers should discharge their duties:" on which account the proconsul whose time of office had expired had to give judgment and to do everything until the advent of his successor; nor could he even sooner dismiss his legate from the province, *d. l. 10*. What difference, I pray you, does it make whether it is through absence or by the continuing illness of the magistrate preventing him from discharging his public duties, and lessening his mental strength for their discharge, that the trial and decision of criminal cases is protracted and postponed, and the ability to try them thoroughly made impossible? especially when our law lays down that those who cannot superintend the discharge of business, or who have in themselves no power to discharge them, should be considered in the light of absentees, even if naturally and physically present, *l. ult. ff. de verb. signif. (D. 50. 16.)*; *l. ait prætor 23. pr. et § ult. ff. ex quib. caus. majores (D. 4. 6.)*; as also that illness no less than absence is a cause for the substitution of other tutors: *§ item qui 2 et § item propter 7; Inst. de excus. tut. (I. 1. 25.)*. Hence Gaius, treating of a

state or other university which had not an agent or syndic, or a defender, says, "And then also we understand it that there is no agent or syndic when he is absent, or impeded by illness, or is incompetent to act:" *l. 1, § quod vi 2, ff. quod cujusque universitatis nomine* (D. 3. 4.). Nor is this otherwise because it is said by Ammianus Marcellinus, in book 28, ch. 1, "that when business increased on account of the long-continuing illness with which Olybrius" (who was prefect of the city) "was affected, those who were impatient of the delay, and who had brought business forward, prayed by a petition sent in, that the examination of the law-suit should be delegated to the prefect who presided over the grain, and that this was acceded to for the sake of quickness." It is hence clear that this was, as a fact, prayed; but that it was necessarily prayed, and that the prefect himself, when afflicted by a long illness, could not have delegated his jurisdiction at his own discretion cannot be therefrom concluded; nor, I am confident, can it in any other way be proved.

10. Ineptly, however, do some restrict the words *d. l. 1, ff. ejus cui mand. est jurisd.* (D. 1, 21) to the *lex Julia de vi*, in its case, only allowing a liberty of delegation in case of absence, but denying it in all other public prosecutions. For besides the fact that the same reason which operates in favour of the *lex Julia de vi*, is also applicable in other laws referring to public prosecutions, namely that accused criminals, whether really evil doers or innocent persons, should not, on account of anyone's absence, be worn out unheard in the squalor of a gaol, as already said, nowhere is that liberty of delegation peculiarly ascribed to the *lex Julia de vi*, nor has Papinian nominately said so of the *lex Julia de vi*, but has rather said that by the *lex Julia* itself it is provided that "he on whom the exercise of jurisdiction devolves can delegate it when he sets out on a journey." But it is no consequence of this that what is found laid down by the *lex Julia* does not obtain in other public trials; for it is laid down by the same *lex Julia de vi* that in respect of the provisions of that law, those below puberty should not be witnesses, nor those condemned by public trial, nor the like: *l. testium 3, § lege Julia 5, ff. de testibus* (D. 22. 5.), and yet no sane person would rightly conclude that therefore they would be fit witnesses in other criminal proceedings. Add to this what Marcianus says in *l. 1, § abolitio ad Senatusc. Turpill. 8, ff.* (D. 48. 16), that cancellation of sentence which has reference to "*merum imperium*" only, is wont to be sought and obtained from the *præsides*, but that those who are present cannot delegate the cognition thereof to another; whence, on the contrary, you will rightly deduce that those who are absent can do so.

11. But just as legal, or extraordinary, jurisdiction cannot be delegated, so neither can jurisdiction which is delegated to another be again delegated by the person to whom it is delegated, *l. ult. ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.): *l. more 5, ff. h. t.* (D. 2. 1.), because, as has been already said, the mandatory exercises it in the stead and name of the mandant, and therefore at another's favour, having no juris-

diction which is his own; so that it is not even in the power of the mandant so to act that he himself should cease to have jurisdiction, and that it should so pass to the mandatory, that he should exercise it as if it were of his own right; for neither can a magistrate, abdicating his authority of his own private will, lose it, *l. penult. ff. de offic. præs. (D. 1. 18.)*, nor even if he could quite completely do so, would he thereby have the right of transferring his authority to another; by his abdication he would merely lay aside his own authority which would then be conferred on another, at the discretion of the Princeps. And it is as referring to this non-delegation of this delegated jurisdiction that I understand what is said in *l. un. C. qui pro suâ jurisd. jud. dare darive posse (C. 3. 4.)*, and especially the rescript of Gordian in *l. a judice 5. C. de judiciis (C. 3. 1.)*, where it is said "that a judge delegated by a judge has not the power of delegating his authority," the reason being added that "he himself should discharge the judicial function." Nor can I at all abandon this view, for unless by *judge* you there understand the magistrate, and by *judge-delegate* the mandatory of the jurisdiction, and farther by *the power of appointing a judge* the power of delegating a delegated jurisdiction, and of substituting another in one's stead, and unless, moreover, you construe the reason given "that he himself should discharge the judicial function" as if there were written "that he himself has no jurisdiction of his own, but only does all in the stead of another," and thus is not truly a judge or magistrate, but only discharges the judicial function as a judge or magistrate does his, according to *l. 1, § 1, ff. de offic. ejus cui mand. est jurisd. (D. 1. 21.)*, and other laws above cited:— unless, I say, you so interpret the whole law, and if you should instead of that say that it must be taken to refer to the case of a petty-judge appointed, and that such judge is denied the power of appointing a petty-judge,— unless you do this, the subjoined reason of the law above cited can never be accommodated to the law as laid down. For what, I pray you, would be the result if we said that a petty judge cannot substitute another judge in his own place, because he himself discharges a judicial office, or because he himself is a judge? unless you also conclude for the like reason that he also who has jurisdiction by the law of the magistrate, cannot delegate it to another, and thus substitute another in his place because he is a magistrate. That the expression "to appoint a judge" used in the Code is almost the same as to mandate, or delegate jurisdiction, is clear from the inscription of the title, "those who for their own jurisdiction can give, or be given, judges," comparing it with the *l. unic. of the same title*, in which is only treated concerning delegating or mandating jurisdiction. And thus also are they called "judges appointed" who make "*restitutio in integrum*" by virtue of a delegated jurisdiction: *l. ult. C. ubi et apud quem cognit. in integ. restit. (C. 2. 47.)*

12. An exception is made in *d. l. 5. C. de judiciis (C. 3. 1.) et d. l. un. C. qui pro suâ jurisd. jud. dare darive posse. (C. 3. 4.)*, where the judge has been appointed by the Princeps, that is such a judge as he to whom

jurisdiction has been delegated by the Princeps himself, and not by the bestowal, merely, of such a title or magistracy in which such jurisdiction was adherent. To such an one belongs, by peculiar law, the power of delegating jurisdiction, and of substituting another judge for himself: *d. ll.* Such judges I take those to have been whom *Paul, libr. 5. sent. tit. 5. in pr.* tells us were prayed for extraordinarily from the Princeps, and whom Ulpian says were "clothed with any power by the Princeps," and he immediately adds, "who preside with jurisdiction," *l. pen. ff. de judiciis* (D. 5. 1.), and against whose decrees no one, except the Princeps who appointed them, could give *restitutio in integrum*: *l. minor 18, § pen. ff. de minor 25 annis* (D. 4. 4.). Such also are substitutes appointed by the Princeps, who, although they are neither *præsides* nor *prefects*, yet act in their stead, and having received imperial autographic appointments, administer and discharge those duties the performance of which would otherwise have devolved on the *præsides* themselves or the *prefects* of the city. - For this reason, where in *l. procurator 2, C. de pœnis* (C. 9. 4.) et *l. procurator 3. C. ubi causæ fiscal.* (C. 3. 26.), *l. 1. C. de pedan. judicibus* (C. 3. 3.); *l. ex consensu 23, § 1, ff. de appellat.* (D. 49. 1.), mention is made of those procurators of the Emperors "who did not fill the place of *præsides*," and to whom, therefore, criminal jurisdiction was denied, it is inferred that there were some who, acting in the stead of the *præsides*, had the right of "*merum imperium*" [see §§ 1. 5. 10. 11—*Transl.*]. And therefore deportation could be made, according to Ulpian, *l. 1, § a præfectis 4. ff. delegatis 3* (D. 32.), not only by the *prætorian* prefect but also by him who, acting in the stead of the *præsides*, took cognizance, by the mandates of the Princeps. And it is not to be wondered at that those to whom jurisdiction was committed by the Princeps, were able again to delegate it to another, since, notwithstanding the mandate, they exercised their own jurisdiction, by special right, and not another's jurisdiction. This is manifest both from that which Cassiodorus in *lib. 6. var. formul. 15.* says, "that it is a jurisdiction proper (or original) which is given by the Princeps," and from this fact that "*merum imperium*" [see § 1. 5. 10—*Transl.*] is found accorded to those who take cognizance by virtue of the mandate of the Princeps, *d. l. 1. § 4, ff. de legatis 3* (D. 32.), which "*merum imperium*" was not exercised in another's name, since it was not delegated to any one. And this was peculiar to those appointed by the mandate of the Princeps, because appeal lay from those to whom jurisdiction was delegated to those who delegated it, *d. l. unic. C. qui pro sua jurisdict. jud. dare* (C. 3. 4.), whereas generally appeal lay to those, who are above the delegators: *l. 1, § ult. ff. quis a quo appell.* (D. 49. 3.). To this first exception another can be added, where, namely, he who delegated or mandated his jurisdiction conceded to his mandatory the power of sub-delegation: that this can be done is apparent from this, that whatever is not made competent by special law can be delegated: *l. 1, ff. de off. ejus cui mandata est jurisdictio* (D. 1. 21): but the power of delegating jurisdiction to another is, according to our ancestral custom,

not exercised by virtue of special law, but by the law of the magistrate: *l. more 5, ff. h. t.* (D. 2. 1.). The consequence of which is, that the prætor was so able to mandate his jurisdiction to another that the mandatary could delegate to another, not only his own, but also the jurisdiction of the prætor himself who delegated; and thus it followed that not only he himself acted instead of the prætor, but that, as a third person, he exercised jurisdiction instead of the prætor.

13. Besides, although the law does not confer this mandated jurisdiction, it yet confirms it, *l. et quia nec 6, ff. h. t.* (D. 2. 1.), and there is much difference between the jurisdiction conferred by the law and that confirmed by it, inasmuch as any one exercises the former in his own name and right by the favour given by the law, whereas he exercises the latter in another's name, and at another's will, or at the will of a private person "prolonging" it, of which hereafter. From the fact that the law is said to *confirm*, can be illustrated the meaning of Ulpian in *l. pen. ff. de judiciis* (D. 5. 1.), where he says that he who neither presides over the jurisdiction, nor is clothed by the Princeps with any power, nor is appointed by him who has the power of appointing judges, *nor is confirmed by any law*, cannot be a judge: by him who is *confirmed by any law* seems to have been denoted no one else than the mandatary of the jurisdiction, or he who had a jurisdiction competent by prolongation.

14. In the last place, it must be borne in mind, that jurisdiction is competent either by the mere concession of the Princeps, or by the concurring act of private parties, or by prolongation. For although jurisdiction cannot be given, by the pact of private persons, to those who do not preside over a tribunal, and have no jurisdiction at all, *l. privatorum 3. C. h. t.* (C. 3. 13.), yet by mutual consent it can be extended to him who was not clothed with such jurisdiction, as is laid down by the *lex Julia judiciorum*: so that this is a kind of that jurisdiction which is not given, but confirmed, by the law; inasmuch as the *lex Julia* makes competent one who was otherwise incompetent in such a case, by means of a prolongation and a voluntary extension of jurisdiction, circumscribed by the litigants within certain limits: *l. 1. l. consensisse 2, § convenire 1, ff. de judiciis* (D. 5. 1.); *l. 1. C. h. t.* (C. 3. 13.); *l. si convenerit, 18, ff. h. t.* (D. 2. 1.); *l. pen. C. de pactis* (C. 2. 3.), *l. si in judicio 80, ff. de judiciis* (D. 5. 1.).

15. This extension of jurisdiction cannot only be made to a magistrate knowing of it, but even to one ignorant, and to one erroneously thinking he has jurisdiction: *l. consensisse 2, § 1, ff.* (D. 5. 1.). Nor is the consent necessary of that judge before whom the defendant would have had to be summoned if no extension were made, provided the right and privilege of the Court had been originally introduced in favour of the renunciant and prorogant. It would be otherwise if it had been introduced for the benefit of a higher party, and therefore not given so much for the benefit of litigants as for the Court; which, among other instances, is the case with regard to the governor of a territory having patrimonial

jurisdiction, in which case there is need of the consent of a judge, lest by another's act he should lose jurisdiction: *Andr. Gayl. lib. 1. observ. 40*; *Merula's practice, lib. 4. pt. 2. tit. 1. cap. 13. num. 3*; *Vinnius de jurisdict. cap. 10. num. 3*; *Leeuwen cens. for. part 2. lib. 1. cap. 18. num. 1, 2.*; *P. Bort. treatise on arrests, cap. 1. num. 16 et seqq.*; *Zangerus de except. part. 2. cap. 1. num. 362 et seqq.*

16. It seems without doubt that this prorogation (or extension) of jurisdiction can not only be made by the greater but also by the lesser magistrates; inasmuch as the latter, also, have jurisdiction, although more limited: and this is sufficient, that prorogation may be rightly made: *l. 1, ff. de judiciis (D. 5. 1.), l. ult. ff. h. t. (D. 2. 1.), joined to l. inter convenientes 28, ff. ad municipalem (D. 50. 1.), and to this refers l. de quâ re 74, § 1, ff. de judiciis (D. 5. 1.), which must be understood as not referring to a petty judge, but to a municipal magistrate directed by the law to adjudicate up to a certain limit, according to d. l. 28, ff. ad municipal. (D. 50. 1.).* Nor is the power to prorogate limited to these magistrates themselves, but goes also to the mandatories of the jurisdiction; since these also exercise jurisdiction according to the right and in the stead of the mandant, and represent him; provided that universal jurisdiction has been mandated to them. For if the jurisdiction of only one cause or of particular causes has been mandated, I think that the restricted limits of the mandate would prevent the power of the mandate extending beyond the thing or person expressed in the mandate, for a mandate of jurisdiction copies the nature of a simple mandate, *l. et quia 6, ff. h. t. (D. 2. 1.),* and no one is allowed to exceed the limits of the mandate undertaken: *§ is qui exsequitur 8. Instit. de mandato (I. 3. 26.).* This is also so by the canonical law: according to which all prorogation made by a delegate is void: *cap. P. et G. per literas 40. extra, de offic. et potest. jud. delegati*; *Vinnius tract. de jurisdict., cap. 10. num. 6, 7.*

17. But those colleges and corporations to whom only certain causes are committed for the purpose of pronouncing judgment (as, for instance, with us, the colleges ruling maritime affairs, the delegates of the Courts, gecommitteerde Raden; also delegates nominated by the magistrate of every city to deal with certain causes in the town, such as minor's cases, matrimonial, nautical cases, &c.), cannot rightly make a "prorogation" of those matters which are not set forth in the public mandate ("instruction," as it is called). Whence it is that a judge who has to try cases of robbery, one who is specially appointed to inquire and adjudicate as to thieves, according to *Corasius, libr. 3. miscellan. cap. 17. num. 9.* is forbidden to adjudge as to pecuniary matters: *l. solemus 61, § 1, ff. de judiciis (D. 5. 1.)* and consult *Merula's practice, lib. 4. part 2. tit. 1. cap. 13. num. 6*; *Vinnius de jurisdict. cap. 11. num. 2.* I think that the same must be laid down as to privileged Courts, and that therefore no prorogation can be made by those who are not clothed with the privilege of a Court when they wish to submit themselves to a privileged Court, lest a privilege introduced for certain persons and causes should become

a common law, at the will of those wishing to prorogate jurisdiction : *Augustin. Barbosa collectanea ad l. 1 C. de jurisdic. num. 4 et seqq.* Although, therefore, it is true that a soldier can submit himself to the jurisdiction of a civil judge, and clergy to the jurisdiction of lay judges, *l. pen. C. de pactis* (C. 2. 3.) (although the latter was displeasing to the canon law : *cap. significasti 18. et cap. si diligenti 12. extra, de foro compet.*), and that academic students of the university may renounce their privilege of academic Court, provided that they are majors while at the university : *Ampliatie der Statuten van d'Universiteit tot Leyden 24 Martii 1662, vol. 3. placit. Holl. l. p. 546* : yet that those who are not soldiers, or clergymen, or students, should by express agreement submit themselves to a military, an ecclesiastical, or an academic judge, and thus make themselves sharers of the privilege, this the very nature of the privilege does not allow, and the authority competent to ordinary judges in their own territory cannot be lightly diminished in this manner. Whence such plaintiffs and defendants, and even the judges permitting it and adjudicating on it are to be punished, as is laid down in *l. in criminali 5, § 1, C. h. t.* (C. 3. 13.), joined to *l. si militaris 2. C. si a non compet. judice judicat. esse dic. Ant. Faber Cod. libr. 3. tit. 12. defin. 4, 8, 10 ; Gratianus disceptat. forens. cap. 238. num. 34 et seqq. ; Responsa Jurisc. Holland, part 1. consil. 311. et part 3. vol. 1. consil. 36.*

18. Not only by express, but even by tacit consent, can this prorogation be made, so that one prætor can be had recourse to for another, provided only that such a prætor is had recourse to as could lawfully have been prorogated into the jurisdiction by the express agreement of the parties ; an urban prætor, for instance, for a peregrine prætor, or *vice versâ*. That this may be better understood we must take into consideration that it may either happen that the incompetent judge was had recourse to at the instance of both litigants together, and with their free will, or that he was called upon by the plaintiff only, the defendant being unwilling and still thinking about it. If by both together, and voluntarily (which may especially happen in the case of co-heirs, partners, and others about to have recourse to, as it were, a double trial for dividing an inheritance, or the like, according to *l. in tribus 13. and l. 14, ff. de judicis* (D. 5. 1), it is to be seen whether the litigants acted in certain knowledge, and were not ignorant that the cause in question belonged to the jurisdiction of another magistrate, or whether they had so acted in error. For if it is clear that they have acted advisedly and knowingly—if, for instance, knowing that it was the attorney of the fisc they went to him concerning a private law suit—they will seem by such mere going, which is, as it were, a tacit consent declared both by word and deed, to have subjected themselves to a judge not their own, even if no contesting of the suit has yet followed ; just as much so as if they had agreed to that among themselves by express convention : for what does it matter whether any one declares his consent by express consent, or by things and deeds, arg. *l. de quibus 32, § 1, ff. de legibus* (D. 1. 3.)

l. non tantum 5, *ff. ratam rem habere* (D. 46. 8.). But if it appear to have been done in error, "prorogation" will not seem to have been made, since with him who errs all consent is generally wanting: *l. si per errorem* 15, *ff. h. t.* (D. 2. 1.) *l. consensine* 2. *in pr. ff. de judiciis* (D. 5. 1.) *l. nihil consensui* 116, *ff. de reg. juris* (D. 50. 17.). But that which those do, by mere addition, who know that a particular magistrate has no jurisdiction, and yet advisedly go to him with a lawsuit, that results also in the case of those acting in error as soon as *litis contestatio* follows: provided it has been made before such an one as one before whom the parties were not forbidden to prorogate jurisdiction on the same subject-matter by express consent, as before said; for the law then supplies the want of consent required for "prorogation," inasmuch as it imagines and conceives that the parties have, as it were, contracted in *judicio*, and that thus by the very act of *litis contestatio* consent has intervened, in the same way as in other quasi-contracts the law conceives consent to have arisen where it was naturally wanting: *l. licet* 3, § *idem scribit* 11. *l. depositi* 5, § *si filius* 2, *ff. de peculio* (D. 15. 1.). For it is undoubted that when there is once a *lis contestata*, one of the litigants can no longer decline the jurisdiction of that magistrate before whom the trial has in this way begun, because where a lawsuit had its beginning, there it ought also to have its end: *l. ubi acceptum* 30, *ff. de judiciis* (5. 1.): and the authority of the laws has decreed that dilatory exceptions, and the prescription of the Court itself, must be opposed before *lis contestata* in the commencement, and at the very beginning of the suit, no distinction being drawn between the knowing and the erring: *l. pen. et ult. C. de exceptione* (C. 8. 36.); arg. *l. sed et si suscepit* 52 *D. de judiciis* (D. 5. 1.), which is also clearly laid down, *l. nemo* 4. *C. h. t.* (C. 3. 13.), in which Constantine by his edict commanded all provincial magistrates "that no one after *litis contestatio* at his ordinary seat may decline the examination, nor first implore the help of the prætorian præfect or the *comes orientis*, or any other high judge, but must come to the sacred audience chamber by appeal made according to law." Nor is there any necessity why we should expunge the words after *litis contestatio*, as Gothofredus ad *l. 6 Cod. Theodos. de jurisdictione* does. [This Voët proceeds to argue out, but the passage is not of present practical importance.—*Transl.*]

19. Nor do I think that it is against these dicta as to tacit prorogation on *litis contestatio*, even when made by those erring, that it is found laid down in our law that a sentence passed by one who is not our own judge does not bind; that it has not the force of a judgment; and that a judge appointed for a certain cause does nothing effectual if he pronounce judgment in other causes: *l. 1, 2. et l. fin. C. si a non compet. iudice judicat. esse dic.* (C. 7. 48.) For it makes much difference whether he has sat who had jurisdiction indeed, but not as to such persons or as to such a course as that perchance on which the suit was, and in respect of which there could have been an express prorogation by consent of parties; or whether the lawsuit were decided by

one by whom it could not have been inquired into, even with the express wish and prorogation of the litigants, inasmuch as he was either without all jurisdiction required for prorogation, according to what has been said before, or was only clothed with power limited to special causes. With regard to the former, we may say that *litis contestatio* made in error would do that which otherwise the mere consent given before *litis contestatio* by non-erring litigants would have done, consent express or declared by the act of addition, nor can he be said to be incompetent who would not be also incompetent by prorogation. But it is otherwise in regard to the latter, who are so incompetent, that they could not adjudicate even by express prorogation: for then everything which has been determined by them between litigants is *ipso jure* null, as having proceeded from such who were not clothed with any power of pronouncing judgment given or confirmed by law. As, for instance, if military judges gave sentence in cases not between soldier and soldier, or not between civilian plaintiffs and military defendants, but between civilian plaintiffs and defendants: *arg. l. in criminali* 5, § 1. *unct. l. 5. C. h. t.* (C. 3. 13.); or if judges were given by those who were without the power of giving judges: as, for instance, by the procurator of the Emperor between private persons, for though he could adjudicate himself by prorogation, he could not give judges as between private persons: *l. 1. C. de pedaneis judic. l. ex consensu*, 23, § 1, *ff. de appellation.* (D. 49. 1.), joined to *l. 1. C. h. t. l.* (C. 3. 13). So also if petty judges were appointed by the magistrate to adjudicate on a certain thing, or on something to be decided within a certain time, were to decide about a totally different thing, or after the lapse of the prescribed time; for both as to particular time and case is the power of the judges thus appointed limited, and besides they have not jurisdiction, but rather a mere power of inquiry ("*notio*"); and at any other time, and in other causes, they are to be considered as nothing else than private persons, and therefore without any power of adjudicating: *l. 1. C. si a non competente judice judicat.* (C. 7. 48) *l. cum non* 6 *C. quando provoc. non est necesse* (C. 7. 64). It is concerning these judges therefore, not appointed by law, or petty judges elected for a particular case, and therefore wholly incompetent, that *l. 2. l. 4. et tot. tit. C. si a non compet. jud. judicat.* (C. 7. 48.) is to be received, and concerning other similar cases. And to this appertains what we have laid down above (§ 17) concerning the colleges appointed over maritime affairs, delegates of the Courts, and other similar bodies clothed with an entirely limited power of adjudicating on certain subjects; and also that which is commonly laid down by the pragmatics, namely that sentences *ipso jure* null may even nowadays be appealed from, unless the nullity proceeds from defect of jurisdiction: *Groenewegen ad tit. C. quando provocare non est necesse*, and the authorities there cited.

20. Hitherto we have discussed what the law is as to prorogation where the plaintiff and the defendant at the same time, voluntarily or erring, have had recourse to a judge who was not competent. But if

the plaintiff has, for the purpose of trying a right, solemnly summoned an unwilling defendant before a judge who was incompetent to sit in that matter, but was yet capable to prorogate, I think we must lay down one thing as to the plaintiff, and another as to the defendant. As regards the defendant, he is not otherwise to be considered as prorogating the jurisdiction than if, by answering to the principal summons of the plaintiff, he has made *litis contestatio*, and thus, as it were, contracted in *judicio* with his adversary, according to what has been before laid down (§ 18). For you cannot, from the *in jus vocatio*, the act of the plaintiff only, rightly gather the consent of the party summoned to the jurisdiction of the magistrate to whom he is summoned, even if he has already asked or admitted the copy of the statement of the case issued by the plaintiff: *l. non videtur* 33, *ff. de judiciis* (D. 5. 1.), because the issue of this statement is not intended for aught else than that the species of the coming lawsuit may be shewn, and that the defendant may deliberate whether he will yield or contest; and if he determine to contest, whether he will defend himself by dilatory or peremptory exceptions, or by prescription of the Court itself: so that it is therefore that the name of the judge must be inserted in the statement, *l. 1, ff. de edendo* (D. 2. 13.), concerning which more hereafter in the title on summoning (Tit. 13. Bk. 2).

21. But even if, according to the present usage, we take the case of a defendant detained by arrest, not even then does he seem to prorogate jurisdiction when he has interposed security as to remaining or satisfying judgment. For since according to the most approved practice all bond of arrest is loosened by the giving of security, and liberty of departure is given to the detained person, so it cannot be considered that security is given for any other cause than that he may release himself from detention and enjoy his natural liberty; not at all that he should acknowledge the jurisdiction of the judge and renounce the privilege of his own forum: *Christinaeus ad L. Mechliniens. tit. 3, art. 6. num. 4*; *Peckius de jure sistendi cap. 15*; *Costalius ad l. 1, ff. si quis in jus vocatus non iverit* (D. 2. 5); *Cancerius variar. resolut. part 2. cap. 2. num. 195*; *Mævius de arrestis, cap. 18. num. 8 et seqq.*; *Petrus Bort tract. van arresten, cap. 8. num. 17*. For although the arrest regularly gives jurisdiction to the judge by whose authority it is made, so that not even on the dissolution of the chain of the arrest is the subject-matter remitted by him to the ordinary judge of the defendant: *Bort d. tract. cap. 7. num. 10*. Yet when the arrest has happened on account of such a lawsuit as by its own nature, or on account of the condition of the detained thing, lies only with a particular judge, according to the prescripts of law or custom, and cannot be tried by any other judge, there is nothing which forbids the allegation of a declinatory exception even after security interposed: *Bort d. tract. cap. 1. num. 16 et seqq.* More especially as not even an express prorogation by agreement would be permitted or efficacious in such a case, according to what has been before said.

22. If the defendant, when summoned himself, demands security from the plaintiff who summonses, or prays time to answer, by this very act the judge will seem to be acknowledged as competent, and the way to declining the jurisdiction of the Court will be thenceforward closed, as is clearly laid down in the instruction of the Court of Holland, art. 117. The same will be the case if, besides the exception declining the jurisdiction of the Court, the defendant opposes other dilatory exceptions, for then there is no place for an exception declinatory of the Court. Even if the dilatory exceptions have been admitted, and the defendant absolved from the instance, when the time afterwards elapses during which the effect of the dilatory exception lasted, he can be again summoned before the same judge for the same cause: *Mynsingerus cent. 4. observat. 27*; *Andr. Gayl. libr. 1. observ. 33. num. 11*; *Merula prazi, libr. 4. part 2. tit. 1. cap. 13. num. 5*; *Menochius de præsumpt. libr. 2. præf. 19. num. 5, 6, 11*; *Leeuwen, cens. for. part. 2. libr. 1. cap. 12. num. 2.*

23. On the other hand, with regard to the plaintiff, although many lay down that it should be regarded as the practice of the Court that the plaintiff after he has cited in law may repent before the *litis contestatio* has taken place, and, relinquishing the first chosen Court, may call the defendant into another Court: *Sande decis. fris. libr. 1. tit. 7. de fin. 1*; *Leeuwen cens. forensis, part 2. libr. 1. cap. 26. num. 6*: *Wassenaar, pract. judic. cap. 1. num. 14. et num. 82*: and although Donellus has laid down the same opinion as consonant to the Roman law, *comment. jur. civil. libr. 17. cap. 18. fere in med.*: yet, whatever may perchance be the peculiar practice of this or that Court, I do not at all doubt that it is perfectly opposed, at all events, to the fundamental opinion of the Roman law; and I think that that view is more founded on the truth which I find laid down in *Zangerus on exceptions, part 2. cap. 8*; *Andr. Gayl. lib. 1. observat. 11. num. 6. et observ. 59. num. 6. et seqq.*; *Peckius de jure sistendi, cap. 35. num. 2*; *Radelantius Cur. ultraject. decis. 79*; *Petro Bort, tract. de arrestis, cap. 8. num. 29.*: viz. that it is no longer free to the plaintiff after the citation in law (*in jus vocatio*), and the issue of the statement of the case (*libellus*) that, leaving that Court to which he first went, he can call an unwilling defendant to another judge, although equally competent: and that the defendant may oppose to him so doing the exception of the "*præventio*," or lawsuit elsewhere raised: indeed the defendant may lawfully pray that the plaintiff shall prosecute his lawsuit or be condemned to perpetual silence. For since the plaintiff has himself commenced to make a beginning of the suit by a citation in law, arg. § *ult. Instit. de pœna temere litigant* (I. 4. 16), he cannot think that he has not acknowledged such judge, by this his own act, as a judge competent and suitable for finishing the lawsuit: and this not only where he has called the defendant to one of many competent Courts, but also if he has called the defendant to an incompetent Court, wherever the defendant who could have defended himself by the exception of "incompetent judge," only introduced in his own

favour, and arising to him by the very citation in law itself, has chosen to pass it over, prepared to litigate before a judge who is not his own. The very foundation of reconvention, approved by the Roman law, shews this; for as it would seem unjust that plaintiffs should reject as against themselves the judge whose arbitrament they had thought should be observed in bringing their plaint, and as on that account from the very citation in convention made by the plaintiff, there was immediately born to the defendant, even before the *litis contestatio*, the power of making reconvention before the same judge, so that the defendant not only could, from the very beginning, but also ought to, bring his claim in reconvention, in order that each lawsuit might run *pari passu* to the end: *l. cum Papinianus* 14. *C. de sentent. et interlocut.* (C. 7. 45.) *novel.* 96. *cap. illud.* 2. *l. qui non cogitur.* 22, *ff. de judiciis* (D. 5. 1.); *Ant. Faber Cod. libr. 3. tit. 1. defin.* 11 et 39; *Mynsingerus cent. 2. observ.* 67. *num.* 7.; *Wassenaar pract. judic. cap. 1. num.* 13; it would immediately happen that the right of reconvention, accrued to the defendant, would be taken away, and rendered entirely vain at the discretion of the plaintiff, if it were in his power, up to the *lis contestatio*, to escape, by repenting, from the jurisdiction of the judge to whom he had gone, and to transfer the lawsuit to another Court. To which may be added, that the condition of the defendant ought not to be worse than the condition of the plaintiff, nor should the plaintiff be allowed to do what is not permitted to the defendant: *l. non debet* 41. *ff. de reg. juris* (D. 50. 16.): if therefore a defendant who is called to a competent Court,—whether it be the only competent Court, or the one chosen at the discretion of the plaintiff from among several Courts competent to the defendant,—can be prevented, by virtue of the mere citation in law, from transferring the lawsuit to another judge, even if he had immediately entered his name on the army-roll or had changed his domicile: *l. si quis postea duam* 7, *ff. de judiciis* (D. 5. 1.); *cap. proposuisti* 19, *extra de foro compet. cap. cum lite* 2. *ut lite pendente, in Clementin.*; it is certainly reasonable that much more should the necessity be imposed on the plaintiff of prosecuting the lawsuit in the same Court where it was begun by spontaneous and deliberate citation in law. But if you take the case of a defendant cited by a plaintiff to an incompetent tribunal, it would certainly be just that just as a defendant excepting to the principal statement (*intentio*) is considered to have acknowledged the jurisdiction of an incompetent judge, so that he thenceforward cannot decline such jurisdiction; so, on the other hand, also the plaintiff by his *in jus vocatio* and his *editio* containing the *intentio* of the *libellus*,* may be said so to have acknowledged that Court that he cannot no longer leave it by his own repentance and wish, and pass over to another Court. And this opinion is also clear from the law restored by Cujacius, which is 4 *C. de in jus vocat.* (C. 2. 2.)

[* For the exact meaning of these words, see Sandar's 'Institutes of Justinian,' Introduction, pp. 64-71.—*Transl.*]

24. Less strong are the reasons which seem to militate to the contrary. For although a change of the *libellus* is permitted to the plaintiff, without the consent of the defendant; although the plaintiff can even before or after the *lis contestatio*, so renounce the *in jus vocatio* and the lawsuit put in motion, that he may wholly recede from the lawsuit, nor can it be again thereafter put in motion before either the same nor another judge, unless indeed it be to the advantage of the adversary to bring the commenced lawsuit to an end: *l. postquam liti* 4. *C. de pactis* (C. 2, 3.); *Sande decis. fris. libr. 1. tit. 18. def. 1*; *Radelantius Curiae Ultraject. decis. 79. num. 3, 4*; *Carpzovius defin. forens. part 1. constit. 11. defin. 9*: although lastly, where the plaintiff did not appear, but the defendant made appearance when summoned, only the edict of citation was to be cancelled according to the law of the Pandects, and, when cancelled, that edictal instance only was lost, and the litigation could be carried on anew, *l. et post edictum* 73, § 1, 2, *ff. de judiciis* (D. 5. 1.), yet there is no necessary inference from the renunciation of a lawsuit, or the change of the *libellus*, to the transference of the lawsuit to another Court. And it does not appear from the law of the Pandects that a defendant, if, when the only instance of the edict has been removed, he has to be summoned again, can be unwillingly called to another tribunal, but must rather be recalled to the same tribunal, inasmuch as it had been once elected by free choice of the plaintiff. Not to mention that by the new Justinianean law, the case itself, when the plaintiff after the *in jus vocatio* and before the *litis contestatio* was absent, and cited, had to be finished if the defendant pressed it, *novell. 112. cap. omnem* 3, § *ult.* (*Adde l. ult in fine C. de in jus vocando* (C. 2. 2.)); *Andr. Gayl, libr. 1. observat. 59. num. 4 et seqq.*; *Ant. Matthæus de judiciis disput. 7. thes. 51*, which is also confirmed by *Leo, novell. neque vero. 108*, and did not displease the Ultrajectines: *Instruct. Curiae Ultraject. tit. van de defaulten van den eyscher, art. 2.*

25. What has, however, thus far been said as to the act of the plaintiff making citation in law, or of the defendant contesting the lawsuit, as containing a tacit prorogation, does not apply where either of the litigants has been compelled to act against his wish by the authority of the prætor, and has thus been unwillingly compelled to begin the suit, or to except to it, notwithstanding the allegation of his right. For as in the case of one erring, and thus contesting the lawsuit, it is uncertain whether, if he had been aware, he would nevertheless have submitted himself to an incompetent judge, and whether thereby the contesting of the suit should prevent the suit being transferred to another forum without the consent of the adversary, the law in such doubtful case, as in other quasi-contracts, assuming a not improbable consent from the fact of the contesting of the suit, as before said; yet, on the other hand, in the case of one resisting, the manifest intention of adhering to his right appears, and of declining an incompetent judge. So that therefore a forced contesting of the suit could not be legally presumed or imagined to bring with it any assent on the part of one who is unwilling, nor can

it give to him who compels, or does the injury, any power over him who is compelled, or take away from the latter his *jus fori*: *l. 2, ff. de judiciis* (D. 5. 1.); *Neostadius Curiae Holland. decis. 5. vers. "t is buyten," et versu "werde ook."* Provided only that the violence of him compelling was such that the other party could not have appealed from the rejected exception declinatory of the Court; for otherwise the remedy of appeal lay open to the party called, if he thought himself aggrieved by the rejected prescription of the Court, whereby an irreparable damage had been done him; as will be found more fully treated of under the heading of appeal (*Post tit. 49. 1. num. 14. in med.*). Nor can he be said to have been compelled by the authority of the *prætor* who, not using the remedies of the law, acquiesced in the judgment of the judge declaring himself competent, or who, being called, did not even come, but condemned the *prætor* calling him;—to the contrary, *l. si quis ex aliend 5, ff. de judiciis* (D. 5. 1.). Unless, perchance, there was a very manifest want of jurisdiction in the judge, and he, notwithstanding such evident defect, condemned the non-appearing defendant as contumacious; for it cannot then seem otherwise than that thus the defendant has been condemned by the unjust authority of the *prætor*, and that therefore such sentence ought not to have effect: *Christineus ad. leg. Mechliniens. tit. 1. art. 14. num. 12. et art. 16. num. ult.; Ant. Faber Cod. libr. 3. tit. 12. defin. 44. in notis num. 3; Responsa Jurisc. Holland. part 3. vol. 2. consil. 220. num. 3, 4.*

26. Besides, as the tacit prorogation of jurisdiction thenceforward excluded all repentance without the consent of the defendant, so also he cannot repent, or go against his own pacts, who has undertaken by express pact, or stipulation, that he would not make use of the "exception to the Court," with which he could have defended himself on account of being a soldier, or by the prerogative of dignity or of priesthood, or any other peculiar privilege; because every one can rightly renounce a right introduced for himself, and because pacts entered into, provided they are not entered into contrary to law or in fraud, are to be thoroughly observed: *l. pen. C. de pactis* (C. 2. 3.); *Lamb. Goris adversar. tract. 4, § 2.* Nor ought it to disturb any one that an action is not given on nude pacts, as is said *tit. de pactis* (*Post, tit. D. 2. 14.*). For by such prorogation no action or pact is given or formed, nor does the person of the judge cause any change to the action and its aims, but the power is merely given to the plaintiff of proceeding in another place than that in which the action was to be brought by common right; just as, on the contrary, the power of the plaintiff is restricted, by the mention of place added to the stipulation or mutuum, so that he cannot, in strict law, proceed in any place in which the defendant has his competent *forum* according to common law, but only in the mentioned place: *l. 1, ff. de eo quod certo loco* (D. 13. 4.). When therefore the plaintiff has cited the defendant, by virtue of the prorogation made by pact, and the exception of incompetent Court and judge is opposed, he can, by the replication of

his pact, assert his right of proceeding before such judge, for the pact which would not have been able to found an action will yet be sufficient for exception and replication: *Adde Cujac. tract. 7. ad African. in pr. ad l. 18. ff. h. t.* Meanwhile it must not be thought lightly that the definition of Africanus is opposed to what has been laid down, wherein he says in *d. l. 18, ff. h. t. (D. 2. 1.)* "if it is agreed that another prætor than he who has jurisdiction shall pronounce judgment, and before he is had recourse to, there is a change of will, beyond doubt no one can be compelled to abide by an agreement of this kind." There are those who think that this *lex 18* does not only refer to the repentance of one party, but to cases where by mutual desire there is a recession from the prorogation made: *Coriasius Miscellan. libr. 4. cap. 5. num. 4 et seqq.; Wisserbach ad Pand. disp. 6. thes. 42.* To this opinion I cannot subscribe, because in *d. l. 18.* the opinion is definitely laid down with reference to the case where the assistance of the prætor had been implored before adition had been made: whence, on the contrary, it follows that if adition had been already made the power of repentance would have been considered by Africanus as excluded. And if it had been the will of both which had been changed, as they say, I can certainly find no reason at all why it would not have been allowable to change by mutual consent even after the adition, and thus not to abide by the agreement. I know that there is a contract as it were in *judicio* "that the lawsuit should be finished there where it was begun," but this must be not taken in any other sense than that the plaintiff should not be able to transfer the suit to any other forum without the consent of the defendant, and that without consent of the plaintiff the defendant should not desire it after the contestation of the suit. But as, with the consent of both, the judge could be departed from before whom the lawsuit was begun, and another judge be gone to to declare the law concerning the same cause not yet terminated by the sentence of the first judge, to do so is neither interdicted by the laws, nor do I consider it foreign to the reason of the law. It is certainly clear that those who had agreed to arbitration may leave the arbitration and have recourse to the judge, and again, spurning the authority of the judge, may return to the arbitrator, being in no other way to be checked than that the prætor would not again compel the spurned arbitrator to finish the referred cause: *l. sed si in servum 9, § ult. l. 10. l. 11, ff. de receptis, qui arbitr. receper. (D. 4. 8.);* and if it be allowed to return from the judge to the arbitrator, there seems no reason why it would not be also competent to the litigants by common consent to transfer the lawsuit, for the purpose of being finished, from the judge who had begun to take cognizance of it, to another judge: *Adde Donellus comment. jur. civil. libr. 17. cap. 18. ante medium.* For the judicial investigation having been begun between the litigants, there is as it were a contract between the contending parties, but the principles of law teach that even from a contract you can resile by mutual consent. Not to mention that where a lawsuit has even been decided by a judge, you can in strict law ventilate it before

another judge and again try the action, which can then not be otherwise elided than by the exception of *res judicata*: § *item si in judicio* 5. *Instit. de except.* (I. 4 13.): and if he who is cited again for the same cause choose to omit taking this exception, perhaps hoping that the judgment of the new judge would be more favourable to him (and he certainly might omit to take this exception, thus renouncing the right and benefit introduced for himself), I do not think there is a doubt that the judge later had recourse to would rightly adjudicate, and that his sentence would have effect; just as a later oath (*jusjurandum*) would be of effect against him, who, though he could have defended himself by the exception of a former oath, omitting so to do has allowed his adversary again to swear in the same cause: which oath had equal, nay greater authority than *res judicata*: *l. in duobus* 28, § *ult. ff. de jurejurando* (D. 12. 2.) joined to *l. jusjurandum* 2, *ff. eod. tit. l. 1, ff. quar. rer. actio non datur* (D. 44. 5.); the *lex* 1 *C. quand. provoc. non est necesse* (C. 7. 64.) not being of opposite authority, since it treats of litigants again cited without consent, and not of those who are condemned against the authority of a prior *res judicata* notwithstanding a legal defence: *Adde tit. de re judicata num. 47* (*Post, tit. 42. 1.*).

27. This being so, and candidly admitting that the solution of this difficulty which sometimes pleased some, does not sufficiently please me, I do not think I shall err if I say that there was a difference of view among the old jurisconsults, which Justinian removed by his own decision, as he himself sufficiently intimates in *d. l. pen. C. de pact.* (C. 2. 3.);—or if I suggest, secondly, that the said *l. 18, ff. h. t.* (D. 2. 1.) can easily be taken as referring to the changed will of the plaintiff, as to which the distinction between a prætor already had recourse to, or still to be had recourse to, finds place. For prorogation of jurisdiction by agreement is generally made by the defendant in favour of the plaintiff, so that he may be able more easily to demand by action from the defendant the complete payment of the debt; but it does not take away the right of competent *forum* in respect of that judge before whom the defendant, prorogation not having been made, should have been summoned: so that where at first perhaps only one judge would have been competent, prorogation adds another to the first one, and so gives the election to the plaintiff, whether he prefers to litigate before the ordinary judge, or before him to whom prorogation is made. When therefore it was agreed in *d. l. 18* that another prætor than he who had jurisdiction should pronounce judgment, the plaintiff could change his will as long as he had not had recourse to him to whom he could have had recourse by prorogation, and may bring the case before his ordinary judge without the consent of his adversary, spurning the entire benefit of prorogation: which is also the daily practice nowadays. But when he has once had recourse to the judge who was competent by prorogation, and called his adversary to that judge's tribunal, he has barred himself, although the suit has not yet been contested, and can no longer, by leaving the

judge whom he has once acknowledged, call his unwilling adversary before another judge for the purpose of trying the case, since the exception of "*præventio*," or "suit elsewhere brought," could be opposed to him as before laid down (*ante*, p. 177). I conclude therefore that the *l. pen. C. de pactis* (C. 2, 3.) treating of a defendant, excludes repentance because a defendant could not by the change of his own will take away a right the plaintiff had acquired by agreement. But that *lex* 18 permits a change of will *before* having recourse, inasmuch as for that reason he may renounce his own right competent to him by prorogation or agreement.

28. It is more correct (*verius*) that, as prorogation binds the prorogant, so also are his heirs bound by force of such prorogation, so that, called to a judge who is not competent except by mutual agreement, they shall appear; both because, succeeding to the whole right of the deceased, whether favourable or unfavourable and onerous, they represent him, have the same *persona* as he had, and have the same powers and rights *l. heredem* 59, *l. hereditas* 62, *ff. de reg. juris.* (D. 50. 16.), and because further, everyone contracts not only for himself but mostly also for his heirs, *l. si pactum* 9. *ff. de probation.* (D. 22. 3), and lastly, because the heir must be there summoned, and must there make his defence, where the deceased had to do so, *l. heres absens* 19, *ff. de judiciis* (D. 5. 1.), and it would be unjust that the accident of death should take away from a plaintiff a right he had gained by agreement: *Sande decis. Frisic. libr. 1. tit. 1. def. 3; Argentæus ad consuet. Brittan. art. 11, not. 3. num. 3; Christineus ad Leg. Mechliniens. tit. 6. art. 7. num. 3; Peckius de jure sistensi cap. 13. num. 1 et seqq.; Leeuwen cens. for. part 2. libr. 1. cap. 16. num. 3.* Although by the death of an Ultrajectine it resulted that the whole force of prorogation, as it were a sort of personal right, is extinguished, so that the heir is not to be sued except before his ordinary judge.

29. In those cases also where by the contract of the husband, an action is born against the wife, either wholly or in part, a prorogation made by the husband binds his widow also after his death, and even her second husband, summoned by marital right, in the name of his wife, to take up the suit in the same Court which was made competent by the prorogation of the deceased husband; for it is fitting that as by his act the wife measures all her right, she should in so far not be unlike an heir and also bound by his prorogation: *Argentæus et Sande d. locis.* But here also the Ultrajectines have the contrary rule, thinking that not even a widow who succeeds to the patrimony is bound by the prorogation of her husband, lest the fiction of marital power should operate beyond its limits: *D. Someren de jure novercar. cap. 7. sect. 1. num. ult.*

30. But whether on the ground of the prorogation of the principal debtor, contained in an instrument of contract, a surety would also be bound to go to the same judge, as to the judge competent to him, if he had not himself added a prorogation to his suretyship, is wont to be questioned. Simon van Leeuwen asserts that in Holland it has been

decided that the surety is indeed bound by the prorogation of the principal debtor, *paratit. jur. noviss. libr. 2. part 1. cap. 8. num. 6. verou, "een principalen,"* but as the reason of that judgment was peculiar, viz., that it was not of advantage to the surety to admit the declaratory exception, as appears from the *Appendix of Decisions after the Consultations of the Dutch Jurisconsults, part 3. vol. 1. pag. 41 in fine*, and as in law the principal and fidejussory obligation is not mentioned among the matters in which one ought to go to the same judge, lest the coherence of the cause (*continentiæ causa*) should be divided, it is therefore more correct to say (*verius est*) that when such terms are wanting in the transaction, the prorogation of the debtor does not injure his surety, unless it is clear that there was a special or general prorogation by the surety himself; for the force and effect of suretyship considered in itself is not that the surety can be drawn to the *forum* of the principal debtor for the purpose of obtaining payment, but only that he shall be subject to make satisfaction of the debt: *arg. l. Centum Capuæ 8, ff. de eo quod certo loco (D. 13. 4)*. As therefore a surety intervening for a debtor simply bound cannot be called to any other than his own judge, even if it be clear that the principal debtor was subject by the common law to his own proper domicile-judge and jurisdiction, so there is no reason why he should be subject to prorogation when he himself had not prorogued; unless we wish to accord a greater power to prorogation, and to the act of a man, than to the disposition of the law. Add to this that suretyship is classed among matters of strict law, in which matters what is not expressed is not supposed to be understood. Lastly, if a defendant has been already called in law, and thus clothed with the exception of "*preventio*," a surety giving security as to appearing, or satisfying judgment, cannot be called to the same judge before whom the defendant had been called, but will keep his privilege of *forum*, as long as he has not renounced it; so much so that he is not taken to be a suitable surety who is of another *forum*, and can be rejected, unless he adds to his intercession a renunciation of his own proper *forum*, so that it is manifest that he intervened for the sake of strengthening any and every tribunal: *l. si ff. si quis in jus. vocat. non iverit (D. 2. 5.)*; *Costalius ad d. l. 1*; *Jac. Coren. observ. 3^o. num. 14*. If this is so, there is certainly no reason why the prorogation of the principal debtor only shall make the surety bound by the prorogued jurisdiction.

31. Further, "prorogation" obtains effect not only when special, but even when made in general words, where any one has, in an instrument, subjected himself and his goods to the jurisdiction of all judges, or declared that he would not avail himself of the "prescription" of any Court: *l. pen. C. de pactis (C. 2. 2.) l. 1, ff. si quis in jus voc. non iverit (D. 2. 5.)*; *l. contraxisse 21, ff. de obl. et act. (D. 44. 7.)*; *Andr. Gayl. libr. 2. obs. 36 num. ult.*; *Ant. Matthæus de judiciis disput. 4. thes. 49*; *Wasse-naar pract. jud. cap. 1. num. 10. in med.* Consult *JClorum Holl. part 4, consil. 269*; unless the prorogation of any specific region by naming it,

is desired by law: on which ground it has been laid down concerning the provincial Court of Holland and Flanders, that by a clause of general prorogation no cause can be referred to those tribunals, but only if the contracting parties expressly subjected themselves to the jurisdiction of these Courts, and if in Holland the suit exceeded a certain definite quantity: *Ampliatio instructionis Curiae Holl. 24 Martii anni 1644, art. 5, 6; Instructio curiae Flandricae, art. 7; Groenewegen ad l. 1, ff. de judiciis (D. 5. 1); Wassenaar d. cap. 1. num. 10, inpr. and Mynsingerus testifies the same concerning the Imperial Chamber: cent. 1. observ. 88.* Where, therefore, there is not found to be a necessity introduced by law or by inveterate custom for making nominate prorogation, a general prorogation will suffice; and on that ground, though no one can, by the more recent law, be subjected to the Court of Holland by the common form, by which any one declares to submit himself to the jurisdiction of all judges, yet by virtue of that formula he will be rightly called to other intermediate tribunals, passing by the lowest tribunals, for instance, to the præfects of Delft and other similar præfects throughout Holland. Consult *JCtor. Holl. part 4. cons. 269*, and that the jurisdiction of the ultrajectine Courts is acquired by the general formula of prorogation, I know has often been decided in that Court, and that such is also the constant practice of the Gelrian Courts.

32. But prorogation is deprived of effect if he who made it is neither himself found in the territory nor possesses goods there which can be subjected to arrest, so that jurisdiction may be founded, *arg. l. ult. ff. h. t. (D. 2. 1)*, but if he stays in the territory he may be compelled to come by virtue of a simple citation in law, without any apprehension of person or goods. Since, therefore, it is clear that the provincial Courts fill the place of the *præsides*, and exercise jurisdiction throughout the whole province, it follows that all the inhabitants of the province, although dwelling in different towns, and under diverse ordinary judges, must come to the higher tribunal when called by a simple citation, on a prorogation legally made: *Sande decis. Frisic. libr. 1. tit. 1. def. 3; Groenewegen ad l. 1, ff. de judiciis (D. 5. 1).*

33. It remains to be discussed in how many ways prorogation can be made: on which point four cases must especially be treated of, according to the four modes in which jurisdiction is found limited by law, viz., place, time, persons, and causes. "Place," it would appear, could not by the principles of the Roman Law be extended by prorogation, so that the præses of one province or the magistrato of one district should be thereby able, by consent of litigants, to pronounce judgment in the territory of another præses or magistrate. For as soon as the præses, or the præfect of the city, or the like, has gone out of his province or the territory of his jurisdiction he will be considered a private person: *l. præses provinciae in sua 3. ff. de offic. præsid (D. 1. 18.) l. ult. ff. de offic. præfecti urbi (D. 1. 12.), l. observare 4, § ult. ff. de offic. procons. et legati (D. 1. 16.)* So that he can neither exercise jurisdiction

himself, nor delegate his jurisdiction to another: *d. l. 4. § ult.* And unless it be so laid down, Marcianus would seem to have warned us in vain in *l. 2 ff. de off. procons. et legati* (D. l. 16.) that the proconsuls "immediately they have left the town have jurisdiction, but not contentious but voluntary." For if by prorogation they could exercise contentious jurisdiction among consenting parties there would have been no difference to be laid down there between voluntary and contentious, for in contentious jurisdiction by reason of the concurring prorogation of parties, there is equally a consent to it as in voluntary, nor can voluntary consent be otherwise exercised than by consent of parties: *Confer Vinnius de jurisdict. cap. 10. num. 8 et seqq.*

34. In the same way neither does an extension and prorogation of jurisdiction appear to be admitted among such magistrates, in respect of time; for every magistrate ought at the termination of his office to abdicate his authority, and to make room for his successor, so that thereafter, he himself is only to be considered a private person, *l. eum qui 13, ff. h. t.* (D. 2. 1.), and thus it would not be a *prorogatio*, but a giving, of jurisdiction made to him who had no right of presiding *in judicio*; against *l. privatorum 3. C. h. t.* (C. 3. 13). If, however, a judge has been extraordinarily sought from and granted by the Princeps (concerning which see *Paolus 5. sent. 5. in pr.*, and the text *supra*), and if a certain time has been fixed for finishing the suit, the periods within which it was ordered that the suit should be ended may be prorogated by consent of the litigants, unless prorogation were specially prohibited in the principal command, and that Ulpian must be understood as referring to this in *l. consensisse 2, § si et judex 2, ff. de judiciis* (D. 5. 1.) is abundantly evident from the mention of "*jussio principalis*," the principal command, which would not be a suitable expression in regard to a petty magistrate, appointed by a magistrate, but only with reference to him who is given by the Princeps, and who, as before shewn, has jurisdiction proper. As it is also laid down by Vinnius and others on *d. l. 2, § 2.* who understood it as referring to petty judges: *tract de jurisdict. cap. 10. num. ult.*

35. In regard to persons, however, it is a settled matter, that they may, by prorogation, be subjected to the jurisdiction of him whose *forum* they could have declined by common law and privilege: *l. 1, ff. si quis in jus vocat. non iverit* (D. 2. 5.) *l. pen. C. de pactis* (C. 23.). And the same is clear as to the quantity not to be exceeded in adjudicating: *l. inter convenientes 28, ff. ad municipalem* (D. 50. 1.) *l. de quâ re 74, § 1, ff. de judiciis* (D. 5. 1.); *Christinaeus ad Leg. Mechliniens. tit. 1. art. 16. num. 5 et seqq.*; *Anton. Faber Cod. libr. 3. tit. 12. defen. 46*; *Joh. Papon. libr. 7. tit. 7. arrest. 32*; *Vinnius de jurisdictione cap. 11. num. 3.* unless lesser causes were mandated to delegated judges or to mandataries, for the sake of administering justice more promptly and easily, matters of greater quantity being reserved for the ordinary tribunals, as it is agreed now obtains in almost all the larger towns of Holland, and the neigh-

bouring regions, and even in the provincial Courts themselves; in which case prorogation could scarcely be admitted, according to what has been already laid down, lest, though constituted as subsidiary Courts, they should in this way draw to themselves a great share of the pronouncing of judgments, and withdraw it from the investigation of the ordinary judges; provided nothing else has been laid down by practice or municipal law, vide *Christinaeus ad Leg. Mechliniens. tit. 1. art. 16. num. 16 et seqq.*

36. There are, however, various causes in which a prorogation of jurisdiction is of no effect, even if made by those who preside over a tribunal. Thus it was the rule in Holland that in causes of insurance, all effect of prorogation ought to cease, whatever may be the amount of money as to which the suit is: *Nader Ampliat. van d'instructie van den Hogen en provinc; Rade 24 Martii, 1644 art. 8*: in other cases prorogation nominately made to the provincial Court was not otherwise allowed than where, had the proroging parties submitted themselves at once to their ordinary or daily judge, they could have litigated in the larger towns, as to a debt over 300 florins, in the smaller towns over 150, in the præfectures over 60, in the country over 40. But if they were subject to different subalternate judges of the same provinces, it was allowed that prorogation should be valid as to a debt exceeding 100 florins in the towns, or 50 in the country: *d. Ampliat. 24 Martii 1644, art. 5, 6*. In Zealand also, all prorogation of jurisdiction was disapproved of between those who were subject to one ordinary inferior judge; it was then only admitted where they lived under different judges, and expressly subjected themselves to the provincial Court: *provisieoneel accord tusschen Holland en Zeeland, 7 Martii 1607, art. 3. vol. 2. placit. Holl. pag. 774*. So also those studying at our Universities, as they have a particular Academic forum, are denied the liberty of making prorogation, unless, being over twenty-five years of age, they had made a special renunciation of the privilege of their forum: *Ampliatio articuli 39. statutorum; Acad. Lugduno Batave 24 Martii. 1662*.

37. In criminal cases, lastly, prorogation is very often useless, for a criminal defendant can be seized everywhere, and criminal accusation excludes mostly all dignity, and makes the prescription of the forum cease: *l. 1. C. ubi Senatores vel Clariss. (C. 3. 24.) l. 1. C. ubi de crimin. (C. 3. 15.) l. præses 3. l. cognovit 13. ff. de offic. præsid. (D. 1. 18.)* concerning which more in my titles *de judiciis et foro compet. (post, 5, 1, &c.)*

38. Moreover as when jurisdiction is granted those things also are granted without which it cannot be carried on: *l. 2. ff. h. t. (D. 2. 1.)* it is not surprising that "imperium" coheres to jurisdiction, "imperium," being nothing else than the power of ordering, forcing, and coercing, *arg. l. munus 214. l. potestatis 215. ff. de verb. signif. (D. 50. 16.)* joined to *l. ult. in fin. ff. de offic. ejus cui mand. est jurisdict. (D. 1. 21.) l. imperium 3. ff. h. t. (D. 2. 1.)*. So that even in the acts of voluntary jurisdiction "imperium" is not wanting, for adoption takes place by the "imperium" of

the magistrate as the Emperor says, § 1. *Instit. de adopt.* (I. 1. 11.) not because a magistrate compels anyone to adopt, but in so far that the prætor, by his authority, protects such adoption which originally proceeded from the free will of adopter and adopted, so that no one should go contrary to what was done under his authority and supervision; in the same way almost in which a judge passes sentence, or makes a distribution of things in divisory judgments, in terms of what has been agreed among litigants shall be pronounced: *si convenerit* 26, ff. *de re judicata* (D. 42. 10.) *l. judicem* 21, ff. *comm. divid.* (D. 10. 3.)

39. *Imperium* is either pure or mixed. Pure is "to have the power of the sword for correcting evil-doers," *d. l. 3, ff. h. t.* (D. 2. 1.); the more prominent species and the more frequent mode of correction being placed for the class: so the appellation of dart and beam embraces every instrument by which a man can be killed, and also all material suited for building, § *item lex* 5. *Instit. de public. judiciis* (I. 4. 18); § *cum in suo* 29. *Instit. de rer. divis.* (I. 2. 1.), for that the punishment of the sword was more frequently used in inflicting the punishment of death than other modes of inflicting natural death is clear from *l. aut damnum*, 8. § *vita adimitur* 1, ff. *de pœnis* (D. 48. 19.) *l. 1, pr. ff. de abigeis* (D. 47. 14.). There are, moreover, several grades of pure *imperium*, for to it belongs, without doubt, not only the highest punishment, i. e. the infliction of natural death, but also civil death, inflicted by condemnation to the mines and transportation, and relegation, and condemnation to the public works, blows with sticks (and according to our present practice condemnation to perpetual imprisonment): *l. capitalium*, 28. *pr. et* § 1, ff. *de pœnis* (D. 48. 19.) *l. nemo potest* 70, ff. *de regulis juris* (D. 50. 17), *l. solent* 6, in *pr. ff. de procons. et legati* (D. 1. 16) And therefore because *merum imperium* was neither given by law to the legate of the proconsul, nor could be delegated by the proconsul, the right of chastising, punishing, and severely beating was denied to him: *l. si quid erit*, 11, ff. *de offic. procons. et legati*. (D. 1. 16), joined to *l. 1, § 1, ff. de offic. ejus cui mandata est jurisdict.* (D. 1. 21.) Lastly, the infliction of pecuniary fines for public crimes should not be rashly reduced to the *merum imperium* arg. *l. relegati* 4, ff. *de interdict. et relegat.* (D. 48. 22), joined to *l. 1, ff. de offic. ejus cui mand. est jurisdict.* (D. 1. 21.); *Vinnius tract. de jurisdict. cap. 1. num. 5.*

40. This "*merum imperium*" does not so much solely consist in the natural act of correction, so that all jurisdiction is wanting, but more in the power of correction, to which is added the power of examining and condemning or absolving criminal defendants after cognition of the cause, so that a precedent cognition of the cause, and a trial is indissolubly connected with and coheres to this *imperium*; and therefore it is said to be an extraordinary kind of mandate by which the proconsul, who could not delegate pure *imperium*, mandated to his legate the cognition of the prisoners; so that having first heard them he should remit them to the proconsul who will then liberate the innocent and punish the guilty:

l. solent 6. in pr. ff. de off. procons. et legati (D. 1. 16.) *Adde Wissenbach ad Pand. disput. 6. th. 6; Vinnius d. cap. 1. num. ult.* Thus they seem to be in error who think that it is called "*merum imperium*" because it is, as it were, separated from all jurisdiction, for there was never a time in the Republic, or under the Emperors, when the truth of this assertion obtained. For with regard to the times of the Roman Emperors, "*merum imperium*" was comprehended under the title of jurisdiction, and that the very exercise of public trial was called jurisdiction by the juriconsults, is fully shewn above in the division of jurisdiction into civil and criminal. And although in the free Republic it was forbidden to the Consuls, without the command of the people, to adjudicate capitally on a Roman citizen, yet wherever the adjudication *was* made, jurisdiction was exercised conjoined to *merum imperium*, whether the *populus* itself, or the *quæstors parricidii*, or the prætors over inquisitions into certain specific crimes, had the duty of exercising criminal trials: concerning which see more in *Polletus historia fori Romani libr. 3. cap. 7; Carolus Sigonius de judiciis libr. 2. cap. 4 et 6.* You will rather agree with *D. Noodt de jurisdict. lib. 1. cap. 4.* that "*merum imperium*" is so called because it appertains to the punishment of offended discipline, and, requires the severity and force of the judge, and on that account is looked upon more stringently and importantly, or as Gadelinas says, *de jure noviss. libr. 5. cap. 13. vers. "aptissime autem,"* or *num. 18.* "on account of a sort of special right of power elucient in so serious a matter," in which sense D. Noodt tells us that with the Romans "*merum*" was taken as meaning "*pro summo.*" And though certainly in civil cases there was only room for the power of the judge *in subsidium*, if any one being refractory, was compelled to deliver, perform, give, or restore those things which he should of his own accord have delivered, &c., without calling in the aid of the judge, but refused to deliver, &c.: but to transact, pay a debt, "*prævaricate,*" or collude with the defendant, was not forbidden to the plaintiff, as is well known: so that it could even be agreed what sentence the judge should give, so that the judge was bound in adjudicating to follow what the litigants preferred: *l. si convenerit, 26, ff. de re judicata* (D. 42. 1.), *l. judicem 21, ff. communi dividundo* (D. 10. 3.): and though all civil trials are at an end when the defendant willingly satisfies the plaintiff in any stage of the case: § *ult. Instit. de perpet. et temp. actionum* (I. 4. 12): yet on the other hand, in criminal proceedings force and compulsion appear in every part, inasmuch as no delinquent is bound by nature or by law willingly to offer himself and his limbs to the punishment constituted by the law, but is bound to await the compulsion of the judge and the evil of his suffering which is inflicted on account of the evil of his action (as Grotius defines punishment, *de jure belli et pac. libr. 2. cap. 70. num. 1.*); so that a criminal defendant wishing to hasten his death is not to be listened to; but appeal made for him by another, even without his consent, ought to be admitted: *l. non tantum 6, ff. de appellat.* (D. 49. 1.) Therefore a

prisoner is unwillingly committed to gaol, to the chains, to military or other custody, to questionings, and suffers sentence and its execution : unwillingly also is the accuser bound, by virtue of his charge made, to persevere with his accusation : often has he to submit to the semblance of custody, often is bound by questionings to detail what he did ; nor can he desist without fear of punishment, or "prevaricate," or collude with his adversary, but has rather to fear the semblance of punishment on the ground of calumny. Thus, however you view it, whether you regard the accuser or the accused, everywhere you will find force, compulsion, *merum imperium*, harsh, vehement, and severe.

41. Who exercised this "*merum imperium*" among the Romans, abundantly appears from what been said in Book I. about the power and functions of individual magistrates. According to the Roman law, it clearly did not appertain to municipal magistrates, but only to the higher ones, as to the præfect of the city, the proconsuls, the præsides, and the like ; for all kinds of even mixed *imperium* did not belong to them, nor could they do those things which were more of *imperium* than of jurisdiction : *l. ea quæ magis. 26, ff. ad municipalem* (D. 50. 1.) But custom has, nowadays, very much increased the rights and powers of states, so that most judges of towns and *municipia*, can not only exercise civil jurisdiction, but also "*merum imperium*," and many free governors of districts, and those whom they call "well-born men," have a bailiff joined to them, in many parts of Holland. And these all discharge the duties of "*merum imperium*" in their own name and right ; whereas, on the contrary, the provincial Court of Holland does so not in its own name, but in the name of the Courts : *Antonius Matthæus de auctionib. lib. 1. cap. 3. num. 2, 8, 9 ; Simon van Leeuwen cens. for. part 2. libr. 1. cap. 3. num. 9 et 11 ; Groenewegen add. l. 26, ff. ad municipalem et ad rubric. ; Cod. de defensorib. civitat. (D. 1. 55.)*

42. Mixed *imperium* is that which coheres to the jurisdiction, or in which jurisdiction is : *l. imperium 3, ff. h. t. (D. 2. 1.) l. 1, § ult. in fine ff. de offic. ejus qui mandata est jurisdictio (D. 1. 21.)* ; for all jurisdiction would be vain and elusory unless it has the force of *imperium*, by which the contumacious are brought to obedience, and decrees can be executed. To which mixed *imperium*, joined to civil jurisdiction, it is agreed must be referred not only the power of giving judges, and of forcing them to judgment, but of restituting *in integrum*, compelling to give prætorian securities, placing in possession, executing the sentences of judges named by them : *l. imperium 3, l. 4. l. eum qui 13. pr. et § 1, ff. h. t. (D. 2. 1.) l. cum prætor 12, § 1, l. venditor 49. in fine ff. de judiciis (D. 5. 1.) l. 1. l. dies 4, § duas 3, ff. de damnos infecti (D. 39. 2.)*, but, especially, whatever, assists as aids for helping the civil jurisdiction, as taking of pledges, imposition of fines, removal made with military force : *l. sacrilegi 9, § ult. ff. ad leg. Jul. peculatus (D. 48. 13.) § pen. Instit. de satisfat. tut. (I. 1. 24.) l. 2, § 1, ff. si quis in jus noc. non iverit (D. 2. 5.) l. unica pr. ff. si quis jus dic. non obtemp. (D. 2. 3.) l. qui restituere, 68, ff. de rei vind. (D. 6. 1.)*,

l. pen. ff. ne vis fiat ei qui in possess. missus (D. 43. 4.) Also imprisonment and military custody if debtors delay payment of their debts, do not satisfy the creditor, or code their goods: *l. 1. C. qui bonis ced. poss.* (C. 7. 71.), *l. nemo 2. C. de exact. tribut.* (C. 10. 18.) Although these last, when decreed from criminal defendants, without doubt are referable to *merum imperium*: *l. 1. l. 3, ff. de custodia et exhib. reorum.* (D. 48. 3.)

43. But although mixed "*imperium*," or the power of forcing and coercing, coheres to jurisdiction by a firm bond, so that they cannot be separated from each other, and there would be no jurisdiction without a moderate correction, *l. ult. ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.), and therefore even those things which in one *lex* are ascribed to "*imperium*" are said in another to belong to "jurisdiction," as for example, the appointment of a judge: *l. imperium 3, ff. h. t.* (D. 2. 1.) joined to *l. cum prætor 12, § 1, ff. de judiciis* (D. 5. 1.) *restitutio in integrum l. ea quæ 26. pr. et § 1 ad municipal.* (D. 50. 1.), joined to *l. in. causæ 16, § ult. ff. de minor. 25 annis* (D. 4. 4.), adoption, § 1. *Instit. de adopt.* (I. 1. 11.), joined to *l. 2, ff. de offic. procons. et legati* (D. 1. 16.); the compelling of the fiduciary heir to adiate and restore the inheritance: *l. ille a quo 13, § tempestivum 4, ff. ad SenatusCons. Trebell.* (D. 36. 1.). Still, there is in fact, if we speak accurately, a distinct character between *imperium* and jurisdiction; so that some matters have *imperium* more conjoined, others less, and thus are considered as partaking more of *imperium* or more jurisdiction: *l. jubere 4, ff. h. t.* (D. 2. 1.) *l. ea quæ 26, ff. ad municipal.* (D. 50. 1.); so much so that municipal magistrates are said to be without *imperium* and power: *l. nec magistratibus 32, ff. de injuriis* (D. 47. 10.) for no other reason, as I think, than that in the time of Ulpian and Paul those things which were more of *imperium* than jurisdiction were denied them: *d. l. ea quæ 26*; it is clear that they were not destitute of all jurisdiction and of mixed *imperium*: *l. magistratibus 12, ff. h. t.* (D. 2. 1.), *l. 1. l. dies 4, § duas 3, ff. de damno infecti* (D. 39. 2.), *l. jus dandi 3, ff. de tut. et curat. dat ab his* (D. 26. 5.), § *nos autem 3. Instit. de Attil. tut.* (I. 1. 20.), *l. ult. ff. de decretis ab ordine fac.* (D. 50. 9.)

44. But that it may be more clearly seen that the nature of jurisdiction and mixed *imperium* is distinct, there are the clear words of Ulpian in *l. tuto 6, § 2, ff. de tutelis* (D. 26. 1.), who said that the giving of a tutor "*was neither a matter of jurisdiction nor of imperium.*" He marks out here two things to which he denies that the giving of a tutor can be referred, "*imperium*" and "jurisdiction." Nor do you rightly except that this obtained in municipal but not in other magistrates, since the appointment of tutor, which is what is here spoken of, equally belonged by law, nay belonged more to the higher than to the municipal magistrates. This is further evident from *l. ult. § 1, ff. de off. ejus cui mand. est jurisdict.* (D. 1. 21.) where Paulus says "*that where jurisdiction is delegated there also seems to be delegated imperium which is not merum.*" Certainly if *imperium* is naturally jurisdiction itself, what reason can there be, I pray, for doubting whether when jurisdiction is delegated

imperium would also seem to be delegated? Why should the answer be the doubtful one "it is more correct," if it were a thing which in itself admits of no hesitation; and why is the special note of Paul in *l. 1, § ult. ff. eo. tit.* (D. 1. 21.) where after the words of Ulpian, Paulus notes that it is truer that *imperium* which coheres to jurisdiction passes with the delegated jurisdiction. Nor is the intention other in *l. 2, ff. h. t.* (2. 1.) where Javolenus says that "to him to whom jurisdiction is conceded those things also are conceded without which jurisdiction cannot be enforced." For jurisdiction is enforced by the intervention of *imperium*, or the moderate power of compelling and coercing, it is defended by pœnal judgment, and fine, and the like, *l. 2, § 1, ff. si quis in jus vocat. non iver.* (D. 2. 5.), and Ulpian commenting on *l. un. ff. si quis jus decenti son obtemp. omnibus* (D. 2. 3.) says "it is conceded to magistrates by the right of their power to defend their jurisdiction with pœnal judgment." They defend their jurisdiction, and this with pœnal judgment, and this by "the right of their power," that is according to that *imperium* which is conceded to them, for "power," as Paulus says, means "*imperium*" in magistrates, *l. potestatis 215, ff. de verb. signif.* (D. 50. 16.) Lastly, this view is abundantly confirmed by the mode of speaking which the jurisconsults used when they said that "*imperium coheres to jurisdiction and jurisdiction is included in imperium*" *l. 1 in fin. ff. de off. ejus cui mand. est jurisd. l. imperium 3, ff. h. l.* (D. 1. 21.) For thus "*pacta adjecta*" are said to be included in a stipulation, and to be included in *bonâ fide* judgments, *l. lecta 40, ff. de reb. cred.* (D. 12. 1.), *l. item quia 4, § ult., l. juris gentium 7, quinimo 5, ff. de pactis* (D. 2. 14.), and yet the nature of these contracts themselves, and of the pacts added to them is different, and pacts may be of force without contracts and contracts without pacts, although such pacts and contracts are jointly of force whenever the *actio* is given on the contract, but is formulated on the adject-pact, *d. l. 7, § 5*, and thus is either given to other ends than those to which the nature of the contract tended, or is weakened, or is wholly elided by the dilatory or peremptory exception of pact opposed by the defendant: *§ præterea 3, Instit. de exception* (I. 4. 13.). Thus also *imperium* to which coheres, and in which there is included, *jurisdictio*, differs in its nature from jurisdiction, and, accurately speaking, the acts of jurisdiction are different from the acts of compulsion and *imperium*. Thus the appointment of judge according to old custom, the appointment of tutor, trial and cognizance, with subsequent sentence, by order or decree of the magistrate, are properly speaking acts of jurisdiction, in which, if there be willing obedience by the litigants, there is no need for *imperium* and compulsion; but if they resist, there follows the *imperium* or compulsion of him who had the power of commanding, when, by pledges taken, fine imposed, military force, and other modes by which jurisdiction is wont to be enforced, he compels judges and tutors appointed to carry out the duty imposed, and refractory litigants are compelled to carry out sentence, order, or interposed decree. *Ita in l. si finita 15, § ubi autem 23, ff. de damno infecti*

(D. 39. 2.) after the "order" follows "putting out of possession," and in *l. restituere* 68, *ff. de rei vindicat.* (D. 6. 1.) if he who is ordered to restore does not obey the judge, when he indeed has the thing, possession is taken from him by the military force, by command of the judge: but especially see *l. pen. ff. ne vis fiat et qui in possea. missus* (D. 43. 4.) where it is said "if any one is placed in possession for the purpose of preserving *fidei commissa*, and he is not admitted, he must be inducted into the possession by the power of him who sent him into possession," and a little further on it is said, "but it will be better to say that he ought to follow out his decree extra-ordinarily by the right of his power, sometimes even by military force. *Adde Vinnius de juridict. cap. 7.* Indeed I do not think that I am wrong when I say, that one and the same act would belong to "*imperium*" considered relatively to another antecedent act, which, considered in relation to another subsequent act would not so much belong to *imperium* as to jurisdiction. Which is clear in security passed for legacies or for injury threatening (*damnum infectum*): for the prætor, when he has taken cognizance of the case, ought to order the legatee to have security given to him, or to him who fears danger from anything dangerous; and therefore exercises jurisdiction. If obedience is not shewn to this order by the heir, or by the owner of the dangerous things, the prætor compels and forces him to the fulfilment of the decree by putting the other in possession: and as he does this to force security from one who is contumacious, he is said to exercise an act of *imperium* and coercion. But if he who is thus ordered cannot be induced to give security, but, on the contrary, refuses to admit him who is sent by the prætor to take possession, the prætor again inducts him, who was then sent but was not admitted, into possession by military force, and is thus said to execute his decree by which he had ordered that he should go into possession to whom security had contumaciously not been given: *d. ll.* A decree therefore of mission into possession is one of *imperium* in as far as it is interposed to compel security ordered by the prætor, and again the same decree of mission is an act of jurisdiction in as far as the prætor uses his own *imperium* and power to enforce this decree by inducting into possession by means of the military force. It is scarcely so therefore, by what has already been said, that the word "*inesse*" in our law is to be taken in the same way as if it were said that it "is one and the same thing": thus fraud is said to be in deceit: *l. juris gentium* 7, § *sed si fraudandi* 10, *ff. de pactis* (D. 2. 14.) For let it be so that in this example the word "*inesse*" is of that meaning; still, as it is an abusive and entirely unusual meaning of the word *inesse*, it should not be extended to other cases where there is a doubt, and certain not to *imperium* and *jurisdictio*, in regard to which it is not clear by any such natural evidentness that they are one and the same thing; it is indeed naturally certain that the difference of fraud and deceit is only in name, and not in reality; nor does this word "*inesse*" allow any other similar interpretation, in the case of *imperium* cohering to jurisdiction, for reason

does not allow that that which coheres shall be said to be the same with that to which it coheres.

45. It must not escape notice that by our own customs and those of many nations, jurisdiction and *imperium* are often considered as being something patrimonial, because it coheres to a thing, a camp, or a territory, and is pledged together with the principal thing, and can be transferred to universal or particular successors of dukes, principes, counts, barons, nobles, and the like, by the right of succession, legacy, donation, sale, permutation, or prescription, in respect of which jurisdiction, as of an incorporeal thing, the *actio*, *confessoria*, or *negatoria*, the interdicts *uti possidetis*, and the other remedies for retaining or recovering possession lie against those who exceed the limits of jurisdiction or exercise a jurisdiction which is not competent to them. It is commonly divided by rude divisions into *highest*, *middle*, and *lowest*; in which are included all which by the Roman law come under the appellation of *imperium*, jurisdiction, and *notio*: so that the *highest* or *greatest* embraces the right of the sword, and "*merum imperium*:" the *middle* include appointments of tutors, the right of fining, of selling under the spear, taking care of the grain, selecting judges, appointing rural tutors: the *lowest* includes the cognition and decision of pecuniary causes and the like: although in these matters there is such a variety of uses in particular places that they cannot be comprehended in a fixed and general definition: vide *Gudelinus de jure noviss. libr. 5. cap. 13. in fine*; *Argentæus ad consuet. Britann. art. 446. gl. 2*; *Vinnius de juridict. cap. 1. num. 1. et cap. 4. num. 4. cap. 8. num. 2. in fine*; *Lambertus Goris advers. tract. 4, § 3*; *Sententien van den Hoogen en provincialen Rade decis. 34*; *Simon van Leeuwen cens. for. part. 2. libr. 1. cap. 3*; *Groenewegen ad tit. Cod. ubi conveniat, qui certo loco dare promisit, et ad l. 4 C. de modo mulctarum*; *Paulum Voet ad princ. Inst. de just. et jure num. ult*; *Burgundum ad consuet. Flandr. tract 9*; *Joh. Papon libr. 7. tit. 7. arrest. 33 in notis*; *Clariss. D. Vitriarium in Institutionibus juris publici Romano Germanici. libr. 3, 15 et seqq. præcitæ 20.* [Further nil.]

46. Jurisdiction is exercised only over those who are in the territory, or have goods there, so that they are subject either in respect of person or of goods: if they are subject in respect of person, the judge will rightly lay down the law concerning them even as to things situated out of the territory. Certainly if it is clear that any one is neither subject in respect of person or goods, one laying down the law beyond his territory may be disobeyed with impunity: *l. ult. ff. h. t. (D. 2. 1.)*, and he is considered to have acted lawfully who violently resists when he has suffered violence or aggression from the magistrate of another place, or his officers or servants, beyond his territory, and in another place, under cover and colour of being a magistrate: *Fabius de Anna consil. 7. num. 11*; *Anton. Matthæus de criminibus. lib. 48. tit. 14. cap. 1. num. 2*; *Chassenæus ad consuet. Burg. rubr. 1, § 7. verbo simplicis resistentiæ, num. 9 et seqq*; *Mysingerius cent. 5. observ. 18. Consult. Jurisc.*

Holl. part 5. cons. 100. pag. 333 et seqq., beginning "*wy ondergeschreven.*" For which reason placats are often found made by the Courts-General, whereby the inhabitants of country villages, answering to the towns conquered by us, are prohibited from obeying any mandates or jurisdictions of the enemy, but only of the Counts, who held and possessed those cities by their guards: *vol. 2. placitorum Holl. pag. 1169 et seqq., usque ad pag. 1190*: it suffices, too, if any one was subject to the jurisdiction in the beginning, although during the suit he has ceased to be under it on account of migration, or change or increase of dignity: *l. pen. ff. h. t. l. si quis posteaquam 7, ff. de judiciis (D. 5. 1.)*

47. There is, however, one case in which the præses being applied to in his territory, grants jurisdiction against one who dwells in the province of another præses, in favour of liberty: *J. non tantum 51, § sed Articulejano 7, ff. de fidecommiss. libertatis. (D. 40. 5.)* There are also cases in which a magistrate being beyond his territory exercises jurisdiction. Thus a proconsul exercises voluntary jurisdiction in another province: *l. 2, ff. de off. procons. et legati (D. 1. 16.)* And by particular right the power was conceded by Albert of Bavaria, Count of Holland, to the prætor of the town of Delft to apprehend evil doers 200 full paces beyond the territory of the town: *vide consult. Jurisc. Holl. part 5. consil. 223, 224.* Nor is it a new thing that by consent of the magistrates who otherwise have jurisdiction by the law of the soil in any place, say a state, others can exercise jurisdiction there, the territory being conceded to them by the urban magistrate, so that there they should adjudicate and make execution according to their own jurisdiction in civil and criminal cases not appertaining to the cognizance of an urban magistrate. Thus the magistrate of Leyden allowed this to the præfect and superior magistrates of the district of Rhynland: *Accoord tusschen de Heemraden en de Stadts Leyden, 28 Noemb. 1595, art. 20, vol. 2. placit. Holl. pag. 1353 et 1354 vol. 2. placit. Holl. pag. 1228 et seqq.*

48. Just as one laying down the law beyond his territory is disobeyed with impunity, so also is one going beyond his jurisdiction, *l. ult. ff. h. t. (D. 2. 1.)*, where, it may be, the power of adjudicating as to causes not exceeding a certain quantity, is so restricted by law or custom that it does not allow of prorogation; for in such case a sentence passed by such judge over and beyond that quantity is of no force, not being even of validity up to the extent to which it might have gone (*ad summam concurrentem*). For although the neglected insinuation of a donation had the effect that the liberality evinced was useless in so far as it exceeded 500 aurei, but was of force as far nevertheless as the 500, *l. sancimus 34. C. de donation. (C. 39. 5.)*, that, however, is not to be applied to sentences; for that case is exceptional: so that a judgment in one and the same trial cannot be valid as to part and invalid as to part, *l. in hoc judicio 37, ff. famil. ercisc. (D. 10. 2.)*, unless it contain different chapters, unconnected the one with the other, some of which, but not all, exceed the power of the judge: *arg. l. etiam si*

patre 29, § *ex causa* 1, *ff. de minor. 25 annis* (D. 4. 4.); *l. quædam mulier*, 41, *ff. famil. erciscund.* (D. 10. 2.); *Rebuffus ad constit. regias*, tom. 1. *tract. de sentent. provisional. art. 2, gloss. 4. num. 7*; *Costalius ad l. ult., ff. h. t.* Wherever, however, the inquiry is as to the quantity pertaining to the jurisdiction, the quantity prayed for must be regarded, not how much is owing: *l. pen. in fine. ff. h. t.* (D. 2. 1.)

49. But if one brings several actions against the same party, the quantity of each of which, singly taken, is within the jurisdiction of the judge, but the lumping together exceeds the limit of his jurisdiction, then not the heaped together, but the single amounts must be had regard to, nor will it seem that anything is above the jurisdiction of the judge, *l. si idem* 11, *ff. h. t.* (D. 2. 1.), unless many quantities are prayed for due from the same cause, as the interest of many years due in respect of the same capital; or if there are many partners in the same suit, whether plaintiffs or defendants, litigating together as to the same thing or quantity exceeding the prescribed quantity; or if the proceeding is by the double actions of dividing the inheritance, or dividing joint property, or regulating boundaries; because although every one may litigate concerning his own share, not exceeding the jurisdiction of the judge, yet the whole thing is brought into judgment, and can be adjudicated to one only in devisory actions; *d. l. si idem*, 11, § *ult. ff. h. t.* (D. 2. 1.); *Costalius and the Commentators generally ad l. 11, ff. h. t.*

50. No one rightly pronounces judgment for himself, or for his own people, nor for his wife or children, nor for his freedmen nor other servants whom he has with him, lest, led by the great affection which he has for such persons, he decrees unjustly, or profits himself by the injury of his adversary. So that not even corporations and mercantile partnerships clothed with a special privilege, and endowed with jurisdiction by the Emperor, can rightly pronounce judgment against those whom it is alleged have traded or done anything against the privileges conceded to them, where, by their sentence, gain or loss could happen to the partnership itself: for in one's own things it would be very improper to allow any one liberty to pass sentence: *l. qui jurisdictioni* 10, *ff. h. t.* (D. 2. 1.); *l. unic. C. ne quis in sua causa judicet* (C. 3. 5.) *l. ille a quo* 13, § *pen. ff. ad Senatusc. Trebell.* (D. 36. 1.); *consult. Jurisc. Holl. part 5. Cons. 104*; and thus a certain very bitter lawsuit concerning the violated privileges of the East India Company was instituted before the ordinary judges of the City of Amsterdam, concerning which see *d. part 5, consult. Holland. conseil. 233, et multis seqq. Adde tit. de judiciis, num. 45 (post, tit. 5. 1. 45).*

51. But were the adversary to consent that anyone should pronounce judgment for himself and his, or be the judge in his own and their cause, it would by no means be absurd, for no injury can be done to a willing person, nor is there any reason why a father can be arbiter to his own son by a mutual promise to abide the award, and not be a judge by consent, *l. quin etiam* 6, *ff. de receptis qui arb. recep.* (D. 4. 8.); and con-

cerning such a case of consent and agreement may be well taken as applicable what is said in *l. in privatis* 77, *ff. de judiciis* (D. 5. 1.) "that in private matters a father may have his son as a judge, or a son his father." For unless the adversary consent, undoubtedly he can defend himself by the well-known exception of "suspect-judge" and decline the father or son of his adversary as a judge. And consent also rests on this foundation, that a son, nay a magistrate who was a *filius familias*, could force his father, who was a fiduciary heir and declared the inheritance suspect, to adiate and restore such inheritance: the fidei commissary heir calling upon such *filius familias*, and having no cause of suspicion; for no loss or gain could accede to the father from forced adition: *l. ille a quo* 13, § *ult. et l. 14, ff. ad Senatusc. Trebell.* (D. 36. 1.). And the prætor, if there is a doubt whether he has jurisdiction, will take cognizance of and decide on the point itself; and in so far seems to pronounce judgment by estimating whether he has jurisdiction: *l. si quis ex alienâ* 5, *ff. de judiciis* (D. 5. 1.); *l. ex quâcunque* 2, *ff. si quis in jus voc. non iverit* (D. 2. 5.); in voluntary jurisdiction nothing prevents anyone laying down the law for himself, as already laid down in *l. un. in fin. ff. de off. consulis* (D. 1. 10.), *l. si consul* 3 et 4, *ff. de adopt.* (D. 1. 7.) *l. an apud se* 5, *l. si rogatus* 20, § *ult. ff. de manumiss. vind.* (D. 40. 2.) Lastly, if it be the Princeps himself, who does not acknowledge a superior, the reason of necessity dictates that he can pronounce judgment for himself, as he may make laws for himself, so that the Princeps is said to have adjudicated between the fiscus in his own right and legatees as to the declaring legacies fallen vacant: in *l. proxime* 3, *ff. de his quæ in testam. delent.* (D. 28. 4.). And Tiberius himself, in the character of heir of his slave, decreed between him and the substituted heir of his slave, that the inheritance should be divided in equal proportions between him as being the instituted heir of his slave, and the substitute: *l. et hoc Tiberius* 41, *ff. de hered. inst.* (D. 28. 5.) et *ult. Instit. de vulg. substit.* (I. 2. 15.)

52. So that an equal has no *imperium* or jurisdiction over an equal, and much less over a superior; so that not even acts of voluntary jurisdiction can be performed over him who is of equal *imperium*, as for example a colleague: *l. apud eum* 14, *ff. de manumissionibus* (D. 40. 1.) *l. apud filius familias* 18, § 1, *ff. de manumiss. vindict.* (D. 40. 2.), *l. nam magistratus* 4, *ff. de receptis qui arbitr. recep.* (D. 4. 8.), *l. iudicium* 58, *ff. de judiciis* (D. 5. 1.) *l. ille a quo* 13, § *pen. ff. ad Senatusc. Trebell.* (D. 36. 1.) but in acts of contentious jurisdiction it may be done if the equals or superiors submit themselves: *vide August. Barbosam. axiom. juris usufreq.* 174. *ibique D. D.* The consequence of which is that in the case where two are lords of the same territory, and have and exercise, as it were, a patrimonial jurisdiction undividedly, one of them cannot punish his partner in the jurisdiction delinquent in that territory, but ought rather to refer the punishment in these and other similar cases to the jurisdiction of a superior power: *arg. d. l. 3, et pen. ff. ad Senatusc. Trebell.* (D. 36. 1.) *Andr. Gayl de arrestis cap. 4. num. 7. Cancerius Variar. resolut. part 2.*

cap. 2. num. 74. But since every magistrate has only authority in his own province, and beyond it is only to be considered a private person, *l. præses provinciæ in suæ 3, ff. de offic. præsidis* (D. 1. 18.) *l. ult. ff. de off. præf. urbi* (D. 1. 12.), the above rule does not prevent a magistrate inferior in dignity from exercising jurisdiction, compulsion, and coercion, in his own territory over those who carry on a suit in his own territory or commit crimes, even if they are magistrates of another territory clothed with equal or greater power. The same must be laid down as to the officers of such other magistrates, clothed with their mandate, and thus sinning; unless something else appear to have been laid down by principal authority or use, between many subject to the same Princeps, but clothed with equal or unequal authority in different territories: *vide Guidonem Papæ decis. 328. ibique Ranchiri et aliorum notas; Bærium decis. 9.*

53. As to the modes in which jurisdiction is to be proved, for example by the exercise of various acts pertaining to jurisdiction, by the erection of places of punishment, by the exaction of gallows as it is called, and whether witnesses and individual witnesses are to be here heard, and the like, *see Voscarpus de probationibus conclus. 948.* It must not be omitted that if there be a lawsuit between two prætors, bailiffs, or the like, as to the bounds and limits of their jurisdiction, they must litigate it at their own, not at the public expense, unless they commenced such lawsuit by decree of the Courts, or of the supreme or provincial Court, or of the Chamber of Accounts: *instruct. Curix supremæ art. 95.*

54. Jurisdiction is ended by the death of him to whom it is conceded, whenever, according to the principles of the Roman law, it is considered as a personal right "adhering to the bones of a person": so that even mandated jurisdiction vanishes by the death of the mandant whenever death comes before the thing has begun to be undertaken by him to whom jurisdiction was mandated: *l. et quia 6, ff. h. t.* (D. 2. 1.) For although petty judges, appointed by the præses, are wont to endure even into the time of their successors, and can be forced to pronounce sentence, *l. venditor 49, § 1, ff. de judiciis* (D. 5. 1.); this cannot, however, be extended to the mandatories of jurisdiction, for the mandatary fills the place of the mandant, and represents him, and uses his right and authority, which power, being extinguished by the death of the mandant, cannot be representatively continued further through the mandatary. But the petty judge, when once rightly appointed according to the manner of tribunals, does whatever he does in his own name; nor does he represent the giver, but has his own cognizance (*notio*), not dependent on the life or the death of the giver: *Vinnius de jurisdict. cap. 12. num. 2.* The case would be different if, adhering to an estate, and existing in the commercium and patrimony of any one, jurisdiction is wont to pass to others, as a flock of cattle or sheep would pass. Jurisdiction also expires by the lapse of the time for which it was conceded, *arg. l. consensisse 2, § si et iudex 2, ff. de judiciis* (D. 5. 1), whence it was that all magistrates were anciently commanded by law to abdicate, inas-

much as when the *decemviri* remained in office after the lapse of their time, proroguing the magistracy for themselves, it gave rise to no slight disturbances: *l. 2, § et cum. placuisset 24, ff. de origine juris.* (D. 1. 2.) It was certainly not without the consent of the Princeps, before the time of administration was ended and a successor was given, allowed to any private person to abdicate of his own accord, especially in the provinces: both because the need of the province required that there should be some one before whom the provincials could carry on their business, and also lest, being without a ruler, they should be exposed to the passion of the evil-disposed: *l. pen. ff. de offic. presid.* (D. 1. 18.), joined to *l. meminisse 10, ff. de off. procons. et legati* (D. 1. 16.).

55. Jurisdiction moreover ceases by the revocation of him who granted it, when either the mandator revokes his mandate, which he can do by the ordinary nature of mandate, *arg. l. quia 6, ff. h. t.* (D. 2. 1.), or where the Princeps gave a successor to the magistrate before the lapse of his time, *l. diem functo 4, ff. de offic. assessor.* (D. 1. 22); *arg. l. iudicium, solvitur 58, ff. de iudiciis* (D. 5. 1), so that a magistrate is considered guilty of high treason who did not leave the province when his successor was appointed, *l. quive de provincia 2, ff. ad leg. Jul. Majest.* (D. 48. 4.), which evocation and ademption can take place in our modern patrimonial jurisdiction also, if anyone has committed a notable and contumacious abuse of the jurisdiction granted to him, by receiving wicked persons, and oppressing subjects, by way of penalty he is to be deprived of all power and jurisdiction, as was enacted by the *Ordinance on Criminal Jurisdiction of King Philip, anno. 1570, art. 23.* Which, however, was so moderated sometimes by decisions both in Belgium and Gaul, that only he who had abused it was deprived of its exercise, the fullest right of exercising the power being left to his heirs after his death, almost in the same way that anciently on account of the too great cruelty of masters towards their slaves, and of the abuse of the owner's power, not only was the right acquired by them wholly taken away, but a sale of the slaves was ordered, so that they should thus be without the dominical power they had abused; in respect to price, however, they had unlimited right: *§ ult. Inst. de his qui sui vel alien. juris* (I. 1. 6.). *Rodenburg de jure conjug. tract. prælimin. de statutis diversit. tit. 2, cap. 5. num. 17. fere in fine; Joh. Papon. libr. 13. tit. 1. arrest. 13; Gregorius Tholasanus syntag. juris civilis, libr. 6. cap. 20. num. ult.* [The rest of the paragraph applies only to feudal rights, now obsolete, and is therefore omitted.]

56. Lastly, as jurisdiction can be introduced by prescription, so it also can be taken away by contrary prescription.

57. To protect jurisdiction various edicts were issued by the prætor. The first is *de albo corrupto*, a penalty being imposed on him who by fraud, not rusticity, broke the tablets, of 500, or as others read it, of 50 aurei, which fine was recovered by an *actio in factum* open to any of the populace, since it was to the advantage of everyone that the tablet

issued for the use as well of the whole people as of individuals should not be destroyed. If any one had no money he was chastised. And when many broke it the proffer of the penalty made by one did not liberate the others, although it was the family of one man who broke it: it was otherwise if the family only advised its breaking, in which case one proffer of payment sufficed, it being as it were out of one act. Nor did it matter whether any one broke the tablet himself or commanded that it should be broken, nor whether he broke it or only threw it wholly down, nor whether he broke it after it was put up or only before it was put up, or while it was being put up: *l. si quis id* 7. *l. 8, 9, ff. h. t.* (D. 2. 1.). This *actio in factum* seems also to be extended to those who either break the edicts of the Princeps or of the prætorian præfect (concerning which *tit. de off. præf. prætoris, ante, tit. xi.*), for those who are clothed with higher power also seem to suffer a very serious injury by such breakage, which should be coerced as much as possible by a like kind of penalty. Since, however, by our modern law many punishments of delinquents are arbitrary, the consequence was that those who with evil intent destroyed the edicts of the Princeps or the Counts affixed to the doors of the courts and gates, such as edicts of citation, and other announcements placed by public authority in the more prominent places, although not for the sake of perpetual jurisdiction, were fined by extraordinary punishment at the discretion of the presiding judge: *Instruct. voor de deurwaarders van de staten van Zeeland 29 Julij 1607, art. 31. vol. 2. placit. Hol. pag. 1136; Menochius de arbitrar. judic. libr. 2, casu 281; Groenewegen and Busius ad l. 7, ff. h. t.; Paulus Voet ad § 12; Instit. de action. num. 4*; so that not even an owner whose things were proscribed by public authority, in error, as if belonging to Titius, could without punishment throw down the affixed notices of proscription, for he ought rather to intervene at the sale. It is otherwise if Titius has only by private authority advertised any things to be publicly sold as his, for as everything can be as naturally loosened as it has been bound, there is nothing which will prevent the notice being privately torn off by him to whose prejudice it has been privately affixed; but those things must be publicly removed which had their beginning in public authority. So what a private person has done on our property can be rescinded by private authority, but what is done by order of the prætor cannot be taken away except by his authority, *l. quemadmodum* 29, § 1, *ff. ad leg. Aquil.* (D. 9. 2.); *l. sed si inter*, 27, *ff. de servit. præd. urban.* (D. 8. 2.) *vi l. fluminum* 24. *pr. versu quid ergo ff. de damno infect.* (D. 39. 2.); *l. ult. § si ad januam* 2, *ff. quod vi aut clam* (D. 43. 24.) In the same way it is permitted to the owner to remove seals privately affixed to his things by others; but not if it appear to be done by the authority of the judge: *l. 1. 2. C. ut rem lic. sine jud. auct. sign. reb. impon. alienis* (C. 2. 17); *Anton. Matthæus de auction. libr. 1. cap. 8. num. 21, 22.*



3.1
P. S. T. J. O. 1880

JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

HIS COMMENTARY ON THE PANDECTS:

WHEREIN, BESIDES THE PRINCIPLES AND THE MORE CELEBRATED
CONTROVERSIES OF THE ROMAN LAW, THE MODERN
LAW IS ALSO DISCUSSED, AND THE CHIEF
POINTS OF PRACTICE.

PART III.,

BEING

Bk. II. (pp. 109-136).

**Tit. 2. That every one use the same law which he has laid
down for another.**

Tit. 3. How if any should not obey the Judge.

Tit. 4. On Citation in law.

TRANSLATED BY

JAMES BUCHANAN,

SENIOR JUSTICE JUDGE OF THE HIGH COURT OF JUSTICE OF THE ORANGE FREE STATE,
SOUTH AFRICA.

CAPE TOWN: J. C. JUTA.

1880.



LONDON :

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHURCH LANE.

BOOK II. TIT. II.

THAT EVERY ONE SHALL USE THE SAME LAW WHICH
HE HAS LAIN DOWN FOR ANOTHER.

SUMMARY.

1. Magistrates who lay down new laws—through favour, hatred, money, or entreaty—granting new actions and exceptions at discretion, are punished, and their heirs also, by being obliged to use that law. So are those who solicit such new laws. This is one exception to the rule that penal actions are not given against heirs. Where a thing is to be confiscated for fraud, and the party defrauding dies before confiscation, the persecutory action lies against the heirs.
 2. It is open to any one of the public to compel the magistrate, &c., who lays down new law to use it himself. The use of a new law by a tutor, curator, procurator, or *filius-familias*, does not injure the minor, principal, or father, unless they ratify. Its use by the surety does not injure the principal, but its use by the principal injures the surety.
 3. Penalty ceases if magistrate was impeded or made grant to a foreigner, or if there was no actual grant. Attempt is not punished if wrong not completed. Penalty applies if law granted but not used. Not to him who uses the law as against the getter. He who pays as against this protecting edict cannot recover.
 4. The equity of the edict is praised. The law of retaliation and retorsion is treated of. It only applies where (a) another nation has laid down rules directly against another, and not merely against a third nation. (b.) Not where a nation's own subjects are bound as well as strangers, and where the law is therefore not special as against strangers, e.g., payment of transfer duty or other fiscal impost. Condition of own citizens and strangers can be equalised in our own country by Princeps so as to compensate for foreign restrictions. Succession duty is thus levied on property in Holland passing to those who thus tax successions coming to Hollanders from abroad. And a magistrate can deny his own laws to inhabitants of countries in which his own subjects are denied rights. But this must only be done where the denial abroad is clear, and not suppositious; for neighbouring states should be friendly and avoid such difficulties. In strict law there may be prohibitions as to testate and intestate succession as against other countries, still Voet thinks reciprocity and equality is far preferable.
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1. SINCE it is not a new thing that magistrates, corrupted by favour, or hatred, or money, or yielding to entreaty, allow actions or admit exceptions which should not have been allowed or admitted, or prescribe a fallacious form of judicial proceeding in a new and unaccustomed

manner, and alter such laws and justice as they had to administer, by a shameful changefulness according to their own discretion; and as they did not the less offend who sought and obtained such things from the magistrates, provision against such cases was deservedly made by the edict of the prætor, and it was laid down that if either a magistrate laid down new law, or if a private person obtained it from the magistrate, by way of penalty, both he and his heirs had to use that law, *l. 1, § 1. si quis 3, § quod autem 5, ff. h. t. (D. 2. 2.)*, for although penal actions are not given against heirs, nor commenced, *l. constitutionibus 33, ff. de oblig. et act. (D. 44. 7.) § 1. Instit. de perpet. et tempor. action. (I. 4. 12.)*, yet if penalties have once been decreed against the deceased (as in this matter, the disposition of the old or common law was *ipso jure* immediately denied to those giving or obtaining new law) nothing prevents their being thereafter continued as against the heirs. On this foundation it also rests that as a thing, the annual payment of which has been defrauded, is *ipso jure* confiscated, and immediately ceases to be his who defrauded, so, where the defrauder dies before the suit is commenced, the recovery of the thing itself is nevertheless conceded to the fisc against the defrauder's heirs, *l. commissa 14, ff. de publican. et vectigal. (D. 39. 4.)*, so that thus a difference obtains between the penalties in this respect inflicted by the sentence of the judge and those imposed *ipso jure*. Adde Hugo Grotius, in the answers of the Dutch juriconsults, *part 3. vol. 2. cons. 165 in fine. Ant. Matthæus de auctionibus libr. 2. cap 4. num. 33. ante med. Donellus ad l. unic. C. ex delictis defunct. in quantum heredes teneantur num. 49 et seqq.*

2. Every one must use the new law which he had given or obtained, and this not only at the petition of the injured party, but of every one else, *l. si quis 3, § hæc pœna 2, ff. h. t. (D. 2. 2.)*, so that the proceeding for this penalty seems to be open to any one of the public. Nor is this surprising, for it is to the advantage of the whole people that the laws should be kept inviolate; and it would come to pass that the laws would be changed by as it were a contrary custom, if a new law were frequently obtained. Clearly, in such cases the suggestion of the assessors would be injurious to themselves, not to the præses, *l. hoc edicto 2, ff. h. t. (D. 2. 2.)*, and the obtaining of the new law by the tutor, curator, procurator, or *filius familias*, neither injures the minor, the principal, nor the father, unless the principal or the father had mandated it or ratified it: *l. si quis 3, § si procurator 1, § si filius 4, ff. h. t. (D. 2. 2.)*. Nor does the obtaining of it by the *fidejussor* injure the principal defendant; although, on the other hand, the obtaining by the principal defendant prejudices the *fidejussor*: *l. si quis 3, § si is pro quo 3, ff. h. t. (D. 2. 2.) Arg. l. mora rei 88, ff. de verbor. obligat. (D. 45. 1.)*

3. This penalty ceases however, if the magistrate, wishing to lay down a new law, was impeded; or decreed against one not subject to his jurisdiction: *l. 1. in fine ff. h. t. (D. 2. 2.)*, or if a private person asked for it, it is true, but did not get it, for the attempt must not be punished when the wrong has had no effect. But it will injure one who has

obtained it, although, having obtained it, he has not used the new law, *l. 1, § 1. l. si quis 3. pr. ff. h. t. (D. 2. 2.)*, provided only he has once demanded it (*d. l. 3. pr.*). In the same way he will not be bound by this edict who has used the same law against him by whom the new law has been given or obtained; for he does not sin who does anything being thereto protected by the authority of the edict: *l. ult. ff. h. t. (D. 2. 2.)*. Nor will he who, on the authority of this edict, need not have paid, be able to recover if he *has* paid, for there will then arise a natural obligation prohibiting the recovery of the undue: *l. 3, § ult. ff. h. t. (D. 2. 2.)*

4. The provisions of this edict are based on the highest equity, for who will despise it, or be indignant, that the same law should be laid down for himself which he has laid down for others, or caused to be laid down, *l. 1. pr. ff. h. t. (D. 2. 2.)*, it certainly is not an injury to suffer (as Seneca says 4 *de irâ cap. 30*) what you have formerly done yourself. And the very-well-known law of retaliation and retorsion rests on the foundation of this title; whereby a magistrate being thereto requested, either voluntarily, or by virtue of his office, must, by a similar act, compensate the act by which person or thing has been injured; for the safety of the public law itself, or of the subjects of the private law. This you find very often approved by the Divine law, *Gen. 9. v. 6. Leviticus cap. 24. v. 17-21*;* and was adopted also by the old Roman law in injuries, and also in public accusations by virtue of laying written information as to a crime, and in many other cases, as is evident from § *pœna 7. Instit. de injuriis (l. 4. 4.)*, *l. nullus 2. C. de exhib. et transmil. reis (C. 9. 3.) l. ult. C. de accusationib. (C. 9. 2.) l. si cui 7, ff. de accusation. (D. 48. 2.)*, *l. cum in eo 44, ff. de pactis (D. 2. 14.) l. cum hæreditas 59, ff. de admin. et peric. tutor (D. 26. 7.)*, *altius 15, ff. si servit. vindic. (D. 8. 5.)*, it has likewise force nowadays in very many public and private transactions; nor is there any doubt that every Princeps and legislator may, in the rigor of the law, impose on the subjects of another Princeps such burdens, or deny to them such benefits, and, lastly, generally exercise over them and their goods such rights, as such Princeps or legislator thinks should be exercised on the subjects of the Princeps who uses retorsion. As is shewn by many examples and cases, by *Berlichius conclus. practicab. part 3. conclus. 51*; *Wesembecius paratit. Pandect. h. t. in fisc.*; *Hahnus ad Wesembecium d. loco*. But as all the examples gathered by these writers do not rest on an equal measure of that equity and prudence required in a legislator, it will be better to lay down certain general rules and requisites, by the concurrence of which the remedy of retorsion may seem just.

5. Above all, then, I think this must be noticed, that there cannot otherwise be occasion for the law of retorsion than where he, against whose subjects another Princeps or magistrate has resolved to exercise

[* But see the New Testament, and the contrary teaching of Christ therein.—*Tranel.*]

this law has already down something of the same kind for his (the other Princes) own subjects; and not at all is there occasion for it where he has decreed its application, not in favour of his own, but of the subjects of a third power. For which reason if the inhabitants of Leipsic have excluded the inhabitants of Frankfort from their marts, the latter may, by the same right, exclude the inhabitants of Leipsic from sharing in *their* markets, but may not exclude the Belgians, who as neutral to the case in question, allow both the inhabitants of Leipsic and the inhabitants of Frankfort to have access to their markets, and to have commercial rights: *Vide Berlichius part 3. concl. 51. num. 27, 28.* Then again this law of retorsion cannot be regularly admitted wherever any very severe or rigid law has been laid down, not out of hatred of or envy for strangers, but generally, as against all, whether subjects or strangers; so that strangers do not have any different position, nor any harder law, than citizens and those who are resident at home. For strangers cannot deservedly make out for themselves any just cause of indignation when it is allowed them to use the same law as is used by the citizens themselves: *Jacob Thomingius decis. 26. num. 6.* Since, therefore, there is a tribute payable in Holland of the 40th part of the price, in sales of immovables, and a 20th on the succession of collaterals and strangers, an impost levied for lightening the burdens of the fisc, and this, whether the sellers or purchasers, or universal or particular successors, be Hollanders or strangers, having their domicile in those places where tributes of this sort were unknown; it would certainly be hard that the necessity of paying this 20th or 40th part should be imposed on Hollander purchasers of, or on Hollanders successors to, the immovable goods of deceased persons situated in places where the use of this tribute does not prevail. For you cannot deny that, in strict law, the Princes of every place can decree that strangers should not take more away from these than their own Princes allows strangers in their turn to take from his territory, so that thus he may make his subjects equal to strangers, or rather strangers to his own subjects; and may so bring it about that strangers should not be in a better condition than his own citizens. For this reason the Saxon constitutions—that a peregrine female cognate should not take more of the moveable utensils of a female cognate dying in Saxony, than the laws of the place in which the party succeeding lived allowed should be taken away by strangers, of the moveable utensils of a woman dying there—are defended by *Thomingius d. decis. 26. num. 13-16*, and everywhere throughout his decisions: *Berlichius d. part 3. conclus. 51. num. 21. et seqq.* It rests on the same foundation that as a law of *issue* or *exit* is introduced by the statutes of many places, by which it is among other things laid down that a certain share of the goods to which not citizens but strangers succeed, should be contributed to the public, which share was in some places fixed at a tenth and in some at a fifth, so it is found laid down in some statutes that a tenth part is to be paid by strangers thus succeeding, but

that if the law of the place in which the peregrine-successors had their domicile, demands a greater payment, say a fifth from peregrine-successors, that then their citizens also be required to allow the deduction of a fifth, by right of *exit*, by law of retorsion. Nor is it open to doubt that it can be defended, as a general rule, that where a prohibitory statute is of force in one place, the provisions of which statute cannot be altered either by subjects or strangers, by express pact made to the contrary, nor is opportunity given to select and approve the statutes of another place (concerning which we have treated more fully on "Statutes," *ante*, bk. 1. tit. 4. pt. 2.), that then the magistrate of another place who sees his laws elsewhere excluded and prohibited, can always again also deny to strangers coming from that place where the prohibitory statute is in force, the provisions and benefit of his own statute, by right of retorsion, if there should be a certain inequality, and if his citizens would be of a worse condition than strangers if such law of retorsion were not exercised. If, however, it were not perfectly certain that the subject of one place would always be damnified, and the subject of another place benefited, but if it were uncertain from the differing statutes of different places whether the result would be gain or loss, it would in no way be advisable to use as against strangers the right of retorsion, or such provisions of the law as prevail at the place of domicile of the strangers, lest we should be involved in inextricable troubles and difficulties: which especially between neighbouring nations are by all means to be avoided. Although, therefore, from what we have said as to the strict law and power of those making statutes in their own territory it is manifestly apparent that nothing prevents a law being made in Holland that the Gelrians or the Flandrians should not testate freely as to estates in Holland because to do so is not allowed to Hollanders with reference to things in Gelderland or Flanders; or by which it may be provided that Ultrajectines in the 4th degree of collaterals should not come by right of representation to possession of goods in Holland with their great-uncles on the father's side, because in such case the Ultrajectines do not admit Hollanders in the same grade to come to the immovable ultrajectine goods by force of representation; or that a Holland father, a citizen of a place using the Scabinian law, should not succeed to his son an Ultrajectine citizen, because on the other hand an Ultrajectine father would not succeed to a Hollander citizen, enjoying the Scabinian law: yet, on account of the uncertain issue of mortality and succession, and the thence arising uncertainty whether the statutes of succession of another place would be more or less profitable to strangers by way of testamentary or intestate succession, than the statutes of the place in which they had their domicile, it would be far better an uncertain gain or loss of succession should be compensated on both sides, and an equal measure of succession be laid down and preserved for strangers and citizens. The same opinion should prevail as much as possible in other matters.

TITLE III.

HOW IF ANY SHOULD NOT OBEY THE JUDGE.

SUMMARY.

1. He who disobeys the judge by opposing the removal of a thing, be he plaintiff or defendant, was formerly punished to the extent of *id quod interest* and of the full value of the thing, even if that were not sued for. If the action were only for a simple penalty, it neither lay after a year nor against heirs. Nor against pupil, minor, nor owner for the act of tutor, curator, or attorney. But now-a-days, according to Groenewegen, such contumacy is furnished in the damages of the suit.
2. The action thus arising is not a popular action, but is confined to the injured party. For the prætor does not so much here defend his injured jurisdiction as he defends the violated right of a private party.
3. It does not matter whether the judge decreed legally or illegally. Whatever a judge orders must be obeyed, and if it is wrong appealed against.

1. He is said not to obey the judge who has not done that which is the very aim of the jurisdiction,—for instance has not allowed the thing to be removed or carried away, according to the mandate of the judge, whether he be plaintiff or defendant who thus acts: *l. un. § 1 et 3, ff. h. t. (D. 2. 3.)* And there is in *d. l. 1, § 1, ff. h. t.* an elliptical form of speech and an imperfect sense of the law unless after the words "*passus esse*" are understood: "he is not bound by this edict or this penalty," viz.:—"he appears not to have obeyed the judge who has not done what is the aim of the jurisdiction: as if any one has not allowed a movable thing to be recovered from him, but has allowed it to be taken or carried away, *he is not bound by this edict*; and besides if he has refused to give effect, then he seems not to have obeyed the judge." Thus every one rightly guards his own right against another vindicating a thing, nor does he thus seem to be contumacious towards the judge. But if he not only would not allow the thing to be vindicated, but would neither allow it to be removed nor taken away, and therefore to allow the effect, that is the taking away, he is bound by the edict: *Cujacius libr. 24. observ. 25.* Against him on this account the personal action in *factum* will lie, not only for *id quod interest*, but for as much as

the thing was which was the subject-matter of the trial, although not sued for by law: *l. unic. § ult. ff. h. t.* (D. 2. 2.); *l. contumacia 53, ff. de re judicata* (D. 42. 1.) Arg. *l. si per 5, § in eum 1, ff. ne quis eum qui in jus voc. vi eximat* (D. 2. 7); and when it contains a simple penalty it is neither granted after the year nor against the heir, *l. un. § ult. ff. h. t.* (D. 2. 2.), nor against a ward, a minor, an owner from the act of the tutor, curator, or procurator: *d. l. unic. § 2, ff. h. t.* (D. 2. 2.) That nowadays this penalty ceases, and that in its stead the contumacious person is punished by the damage of the suit, is laid down by Groenewegen: *ad d. l. un. § ult. ff. h. t.* (D. 2. 2.), so that the plaintiff now gets that *quod interest*, in the same way in which it was the rule in the action *ad exhibendum* and many others according to the Roman law: *Vide l. ult. § 1, ff. de appellation. l. qui restituere 68, ff. de rei vindicat.* (D. 6. 1.); *l. 1, § hæc verba 5, ff. ne vis fiat ei qui in possess. missus* (D. 43. 4.)

2. But the magistrate does not grant this action to every one among the people (as he did in the former edicts, "*de albo corrupto*," or "*jure novo dato vel impetrato*"), but rather to the adversary of the injured party: for although the magistrate is said to guard his jurisdiction by this penal judgment, *l. un. pr. ff. h. t.* (D. 2. 2.), yet in this case his injured jurisdiction is not here primarily vindicated, but rather the right of a private party. Whence it is that the question whether a penalty or whether "*id quod interest*" ought to be given is disputed, *d. l. un. § ult. ff. h. t.* (D. 2. 2.), which dispute cannot arise in popular actions as such, where such a question as that of recovering *id quod interest* cannot find place. Add to this, that although by the violent taking away of the thing which is summoned for, and the repulsion of him who was sent into possession by the prætor, the authority of the magistrate was equally injured, if not more so, than where one did not allow a thing to be taken away, the actions competent on that behalf were, however, not at all popular actions, but conceded to the injured persons only: *l. 1, § ult. ff. ne vis fiat ei, qui in possess. missus* (D. 43. 4.); *l. si per 5, § in eum 1, ff. ne quis eum qui in jus voc. vi eximat* (D. 2. 7.).

3. Nor should it be anxiously inquired, as far as concerns this action, whether the judge legally or illegally decreed the taking away and removal or the like, for even a judge unjustly commanding must be obeyed. Hence when a person was ordered by a penal mandate of a Court to quit a hired estate, and if he opposed the mandate remaining in force for three weeks, he was ordered to come to the Court, and he did not obey the mandate of the judge, he was legally condemned to restore all he had taken, because he ought to have appealed from an unjust command: *Neostadius Curixæ supr. decis. 28.*

TITLE IV.

OF CITATION INTO COURT.

SUMMARY.

1. Citation in law is justly needed lest any one be condemned unheard. To cite in law is to call an adversary before a judge having jurisdiction. Any one may cite who has a legal right to appear in Court: whether an individual or a corporate body through its duly appointed syndic.
2. In citing you must study *place, time, and person*. *As regards place*, a person can be taken from everywhere except house or church refuge; but if any one remained there too long his creditors were put in possession. A ship is a "house" when any one has his domicile wholly in it. But though you cannot forcibly take any one from house or church, you can serve him with summons if he allows you to enter. Announcement of action can be made at house of absent person, or at another's house where one resides.
3. *As regards time*.—No one can be cited at a funeral, nor when getting married, or necessarily in Court as a litigant or a judge. Any one leaving a case in a lower Court to go to a higher to which he is summoned is not contumacious. Priests engaged in religious service cannot be cited. Nor persons travelling publicly on public service. Nor those whom religion requires to be present at any place and not to remove. But any one *en route* to a funeral, marriage, or religious ceremony can be cited.
4. *As regards persons*.—(a.) Some cannot be cited at all, *e.g.*, madmen and infants. Their tutors and curators must be sued. Other minors must be aided by their tutors. If they have none, the suing plaintiff prays the judge for a *curator ad litem*, or according to modern usage the tutors, &c., can be summoned in the name of the minors and madmen. (b.) Others cannot be sued without permission specially obtained. This is called *venia ætatis* and is sought from the Princes. Such a minor might be sued as a major, unless there be a question as to immovables. But according to Dutch law *venia ætatis* brought with it the free disposal over immovables as a rule; and therefore the minor obtaining it can be directly sued even as to immovables.
5. By the Roman law the higher magistrates could not be summoned, except for crime by reason of office, or from any cause which makes him a wicked judge. For former misdeeds it was necessary to wait till time of annual office had expired. The minor magistrates could, however, be always sued.
By the Dutch law magistrates of all kinds can be sued like private persons, although the form of proceeding differs.
6. When this *venia agendi* is obtained parents may be sued by their children. The consequence of not getting permission was, by the Roman law, a penalty going to the parent, and to be recovered within the year: the penalty ceasing

if the citation were not persisted in, or if the parent makes default or appears willingly.

By the Dutch law this penalty is not fixed, but is at the discretion of the judge and not heavy: the usual consequence being absolution from the instance and costs.

Rusticity is no excuse for not getting permission.

The reason of the necessity for permission was respect for parents, and that their reputation should not be assailed by defamatory actions. Therefore the Roman prætor made preliminary inquiry. And though by Dutch law civil actions do not necessarily bring infamy, yet the necessity of obtaining permission continues with us, from motives of reverence. In the lower Courts where no permission of the judge is as a rule needed to sue, still in such actions against parents permission must be specially sought. In the higher Courts where such permission is necessary, the most general clause of permission is sufficient. Yet this clause may be absent, if a clear special petition is otherwise made setting forth all the facts. In Ultrajectina, however, the special clause in the summons is imperative, and the Court itself always takes preliminary cognition of such cases.

7. Under the name of "parents" are here included both sexes and of first and higher degrees. Both legal and natural parents, for both must be respected, just as both must aliment. And whether of pure fame or wicked. The permission is necessary even if the suit be against them in tutorial or curatorial or corporate capacity. But if the father be a madman, his son can sue his curator direct without permission.
8. By similar interpretation a father-in-law or mother-in-law cannot either be sued without the like permission. For affinity also brings a paternal affection. And they enjoy the *beneficium competentiæ*. Permission must be sought even after the title of affinity is dissolved. For then too the (b) (c) remains as a rule.
9. But this permission is not necessary as against a step-father or step-mother who, not being chosen by the children, do not stand on the same footing as a father or mother-in-law.
10. In regard to a wife there is more doubt as to the necessity of permission to sue her. By the Roman law it clearly was not necessary. And, as far as the reason of reverence goes, husband and wife owe each other an equal measure. But by the Dutch law, Voet thinks there is such a necessity, because the wife is so much more subject nowadays to the marital power, which is itself so increased in extent beyond what it was by the Roman law. She can do nothing without her husband's consent; therefore Voet thinks she cannot sue him without permission.
11. Many think a subject cannot sue the ruler or the State without permission. For they are the subjects, father and mother, as it were. But the officers and administrators of the State can be sued, e.g., treasury officers.
12. Ministers, &c., can as a rule, be sued without permission.
13. After treating of the olden form of citation in law which was effected without judicial authority, Voet shews how judicial authority was afterwards interposed. He then explains the form of modern practice, which differed as to the higher and lower tribunals. In the former summons is issued, naming suitable day and place, varying according to local customs. In the latter the citation is verbal. Service must be made within the judge's territory or it is void. Copy of mandate and libel is left with defendant, and necessary documents on which the claim is founded if it is a case of provisional sentence. If defendant is absent, serve on servants, manager or major neighbours; if none, leave at house or affix to doors.

14. If the necessities are done, it does not matter that defendant remained unaware; it is his own fault. But he may be restituted on clearest cause of ignorance. If form wrong, or time, or name, the citation is invalid and all its consequences: even if a friend had accepted service. Unless defendant voluntarily appears, for then he cures defects and cannot except. This is clear practice.
15. To save expense a *mandament of debts* may be prayed, entitling a creditor, not otherwise barred, to summon several debtors at one or diverse times, within a year from getting the receipt, on debts antecedent to the rescript.
16. Besides simple citation there is also an edictal citation either by three edicts or one peremptory edict: public, with trumpet call. Thus absentees are cited when an action *ad rem* is to be brought as to local immovables; if they cannot appear, being criminally banished, they are called to appear by substitute. Attorneys, &c., may in the same way sue foreign clients for services locally rendered, for the judge of the place of action can best settle the recompense. If citation at the debtor's domicile is unsafe from enemies, he is cited at the nearest safe place. Or if he himself bar citation. If he is a wanderer, he is cited where mostly is. Uncertain persons, &c., are also thus cited by edict. Or where a deceased's creditors are wanted to be at an inventory or at the transfer of immovables by judicial decree.
17. The most rigid citation is arrest of person or goods by the authority of the judge until security given. In criminal cases it also applies, and is stronger than even an earlier verbal arrest.
18. A civil arrest is with a twofold object; (a) to found jurisdiction; (b) to conserve the thing or debt. For the latter strangers are arrested, or residents suspected of flight. So also movables about to be removed are arrested, *e.g.*, on the land or house let. If no removal is feared but only dissipation, there is ground for interdict only. The law of arrest is borrowed from the Roman law which favoured it and the vigilance of a creditor.
19. The reason of arrest being necessity, even otherwise privileged persons can be arrested. For the purpose of conserving the thing it can be had recourse to even after contestation of suit, on cause of suspicion of flight or removal arising at any part of the trial. Also in another place and by another judge than where the suit is: even if the law of such place disapproves arrest on that ground, or orders that persons shall be free from arrest. Persons may be rightly arrested even after arrest of goods; and *vice versa*.
20. Arrest for the conservation of the thing can even be rightly made before the due date or the advent of the condition added to the obligation, and therefore before any summons could be issued. Even where the debtor has a dilatory exception of non-suit, or of necessary excussion of the principal. The object is not recovery but security, and that can always be sought. Pledge for undue rent may be prosecuted. The Roman law was full of distinctions on this point between matters *bonæ fidei* and *stricti juris*, but as these distinctions have vanished in modern law, the consequent difficulties have also vanished. This kind of arrest does not cause pendency of suit.
21. But the suspension of flight must have arisen *after* contract to found this sort of arrest. If it was antecedent the creditor took the risk.
22. *As to arrest to found jurisdiction.*—This is not an arrest founded on necessity but on utility, and for the creditor's advantage, viz. to sue at home. It is introduced in favour of commerce to encourage foreign contracts. And because no one can be sued where he is not to be found, and this arrest therefore widens jurisdiction. It prevails everywhere except in Frisia.
23. This kind of arrest is foreign to the principles of the Roman law, which required

- the debtor to be followed everywhere; and was very favourable to strangers, only allowing them to be summoned, not forcibly arrested.
24. Arrest can be sought at all times, even from a judge not on his seat. And at all places, public or private, if urgent; save in a military camp for debts contracted elsewhere, or in certain specified asylum-refuges. Can be rightly made on all holidays, even on Sunday, whether it be an original or a continued arrest. And at any hour of the night. And during the larger-market times.
 25. Arrest *ad fundandum* lies in personal actions on contract or delict. And in real action for movables, which can be sued for wherever the thing or its possessor is. Or where one is wanted as a witness. But in real actions for immovables, the debtor cannot be thus arrested where the thing is not situated. It is a question, may be, whether a real action on an immovable should be brought at the place of the situation or of the debtor's domicile; but elsewhere it certainly cannot be brought. The practice is if the owner does not live at the place of the situation, to arrest there, and force him there to litigate. If any one has both a real and a personal, *e.g.*, an hypothecary action, he cannot even by arrest cause the latter to be litigated elsewhere than at the situation as to the hypothecated goods. As to other goods he may arrest anywhere, or if the creditor has a discretion which action he will bring first.
 26. But this arrest does not lie in all personal actions, for some can only be brought before specific judges and none others, or jurisdiction would be disturbed. Nor does it lie in future or conditional obligations. For this sort of arrest is a citation in law, and to arrest before due date would be a *plus petitio* and liable to the costs and other consequences thereof.
 27. Voet does not treat at length of the manner or form of arrest, because it is a matter to be gathered from practice; and the practice of the Courts varies. The custom of the place of arrest is to be observed. But he remarks, generally, that in the superior Courts the previous cognition of the judge is necessary, not in the lower; that arrest of immovables needs authority of the judge; arrestor must give security as to costs; officer refusing to arrest or arresting wrongly is liable in action for loss.
 28. There can be no arrest by private authority except on the greatest emergency. As a rule it must be on judicial authority, and through the proper officer of the law. But a landlord may arrest a lodger secretly making off with his things just as any one may stop flying debtor, or retain other's things on our ground doing damage on another's flock on our ground. But there must be a handing over to the proper officer as soon as possible.
 29. The judge of the place of situation is he who should decree. But where should rents and annual returns due be arrested, at the debtor's domicile or where the house or estate are? This is a moot point, but Voet thinks at the former.
 30. Ordinary judges, although superior judges, cannot grant a general order for the miscellaneous arrest of the citizens of another Princeps. That is a matter of majesty, and can only be done by the Princeps of the country certain that a foreign Princeps will not do justice though suit instituted.
 31. District judges, however, cannot arrest persons (Hollanders) or things to found jurisdiction, although they can to conserve things. But strangers, Voet thinks they can.
 32. Those judges who have no proper jurisdiction of their own but hold Court by concession in another territory, cannot rightly decree arrest of persons or goods.
 33. All can arrest who have a legal right to appear in Court and to institute action, individually or representatively, *e.g.*, tutor, attorney, &c. Any one having power to cite can arrest, even though there be no special mention of arrest.

But any one having merely a general power to administer cannot arrest, unless there is a clause of free administration, or principal is very often absent. And for conjoint persons there can be arrest without mandate.

34. Minors, prodigals, and married women, cannot arrest without the consent of present tutors, curators, or husbands. But if these are absent, and the necessity is very urgent, they can on giving security as to ratification. But the Ultrajectines do not allow a married woman even so to arrest. Voet mentions but one very exceptional case where it was allowed.
35. Who can be arrested? All who can be cited in law; unless there are special exceptions. Both males and females. By Roman law women could not be imprisoned for debt. But the law nowadays is different. The arrest may be in our name or as heir, even heir with benefit of inventory. Provided the law of arrest is not there reprobated. Even if it is, arrest is granted by way of retort as against citizens of countries arresting.
36. Some persons can never be arrested, viz., those who cannot be cited in law but are under tutorship or curatorship, *e.g.*, married women, minors, unless *venia etate*, madmen, &c. It is a question whether a married woman who is a public trader, can be personally arrested. If he is present, Voet thinks she cannot. He must be, for the reasons he states. A woman cannot be a public trader if her husband dissents. If, however, her husband is absent and she trades publicly, say beyond his domicile, she can on commercial grounds, be arrested.
37. Tutors cannot be arrested, nor curators, procurators, nor testamentary executors. For they act for others and not for themselves; and sometimes are even forced to take the trust unwillingly, so that it would be a hardship to subject them to harsh arrest.
38. Nor can I arrest the debtor of my debtor, though I can arrest what he owes another, and which he has with him. But if he has ceded me his debtor's debt I can arrest (And see *post*, 50).
39. Some persons are privileged from arrest, *e.g.*, soldiers going to camp; those carrying supplies to camp. But soldiers leaving the country not on duty, can be arrested. Those who have privilege of Court cannot be arrested, *e.g.*, advocates, attorneys, &c, members of the Court, University professors at Leyden. If such are arrested, the Court itself, on their application, comes to their relief. Privileges of force within a special jurisdiction do not operate beyond it. Those driven into Holland by an enemy cannot be arrested. Nor the delegates to the assembly of the States General, for they go on public service which must not suffer.
40. They cannot be arrested who are summoned publicly as witnesses, or to account as tutors. But if they come voluntarily they can. A debtor summoned by his creditor to come and compromise, cannot be then arrested by that creditor, for there is a tacit pact of safe conduct to and fro. But if he come of his own free will it is different. So there can be no arrest *at* a funeral or *during* marriage, but before and after, yes. Nor if the creditor has given the debtor a rescript of security, or if the debtor have competently obtained a rescript of delay.
41. Any one being beyond his domicile for purposes of appeal or prosecution of a suit, our law, Voet says, differs from the Roman law in allowing him to be arrested. One debtor being rightly or wrongly arrested by a creditor another creditor can also arrest him. If a creditor arrests a debtor wrongly, and he is released, he cannot be arrested by the same creditor till he has had time to return home; but another creditor can always arrest him. For neither the vigilance nor the calumny of other creditors ought to defeat my rights.
42. Students' goods can nowadays be arrested at Leyden, Voet thinks; and even their

- persons in cases of great emergency, but only by Academic judges. Beyond the province by ordinary judges. Students' relatives not privileged.
43. Ambassadors from other nations cannot be arrested nor their retinue, nor their goods. Violation of legates is clear ground for declaration of war.
 44. Whether delegates to the councils of federated Belgium are free from arrest is a moot point. Voet gives reasons for and against it, but abstains from deciding it.
 45. It is the law of many places that two inhabitants of the same place cannot arrest each other abroad, *e.g.*, two Hollanders out of Holland, &c. unless otherwise decreed by the law of the place of arrest. The practice is for such citizens to appeal to the judge of their domicile for relief. And sometimes from comity, the judge of the place of arrest remits. Sometimes by virtue of express conventions, named by Voet. There are two exceptions named in which such arrest is legal, *viz.*, where one follows up goods sold by him but not paid for, or where one apprehends his adversary in the very place of contract. Then he is bound to litigate there.
 46. But these conventions do not prevent arrests on suspicion of flight; the arrested person being, however, then remitted to his own judge. And a Hollander, though forbidden from arresting a Hollander, may cede his right to an Ultrajectine, who can thereupon arrest.
 47. As children can sue their parents on permission prayed so they can arrest them. This permission is not lightly refused. But parents are not imprisoned if they can sufficiently otherwise strengthen the jurisdiction.
 48. Stepmothers, brothers, nobles, and learned men, can also be arrested. The very dignity and position of the latter should rather make them fulfil their obligations than seek freedom from arrest.
 49. When a debtor's goods have been already arrested and the suit thus commenced, his person cannot be arrested, for the object is already attained. But it would be otherwise if there was a suspicion of flight. Though the principal debtor is arrested the surety may still be, and *vice versa*, even during the suit.
 50. *As to arrest on goods.*—As a rule those whose persons can be arrested can also have their goods arrested. For apprehension of person is more difficult to get than of goods. Goods may, however, be altogether privileged from arrest as, *e.g.*, the goods of those who cannot be personally arrested, *viz.*, ambassadors, &c. (*vide ante*); but this rule has its exceptions. Thus debtor of debtor not arrested though his debt may be, even if conditionally due. Goods of minors, &c., may be arrested to force their tutors, &c., to litigate there.
 51. Annual rents and interest, &c., may be arrested. But not *those* capital or interest in the hands of the treasury, lest public accounts confused; nor with the Bank of Exchange, Amsterdam; nor future aliment. No appeal from decree of aliment, nor compromise unless by decree. *Past* aliment may be arrested.
 52. Wages of sailors cannot be arrested except for debts, clothes, food, rest, during voyage. Stipends, &c., of professors, ministers, advocates, doctors, can be; but whether wholly or partly is a point of difference for the judge. Members of assembly stipend only up to half.
 53. ~~Realis goods~~ can be arrested immediately on the debtor's death if there is fear of loss. In this respect the Dutch law differs from the Roman law, which allowed nine days. ~~Corpus cannot~~ be arrested nor burial impeded under penalty.
 54. Can other's property in possession of our debtor be arrested? We must distinguish. If possessor has no right nor right of detention, *e.g.*, theft or violence, then not, for owner can freely reclaim. As little as they can be pledged or taken in execution can they be arrested for another's debt. Yet

- possession presumes ownership till disproved. But if the possessor has a right of pledge or the like, then yes.
55. Things possessed in community, even indivisibly with another, can be arrested by the debtor of either partner. The other partner has always action for damage and partition as his remedy. If ship arrested, other part-owners may secure the voyage being proceeded with, on condition that the arrest remain and on security being given.
 56. A thing pledged by one debtor to another can be arrested, reserving to the hypothecary creditor his right of pledge.
 57. No one can arrest his own unless to vindicate, or unless they are under pledge to another, and the pledgee becomes my debtor from another cause: then I can arrest to found jurisdiction with my own judge, or if my creditor owes me also things incapable of compensation.
 58. Right of arrest ceases on the appointment of a *curator bonis*. Execution commenced stops, so that all creditors may contest equally as to their rights of preference.
 59. Privilege of immunity from arrest ought to be alleged and proved before contestation of suit, just as declinatory exceptions. If the arresting judge will not recognise, pray protection from the judge of the jurisdiction.
 60. The effect of an arrest rightly made is that there can be no innovation on the thing arrested. Persons cannot move away; if they do are goal-breakers and liable within a year for penalties, &c. Those who aid escape are liable for the debt, especially gaolers and the like.
 61. If the arrest is on things and they are transferred. As to immovables, it is not so easy as there is judicial transfer. As to movables, he who transfers or diverts possession is liable for fine and *id quod interest*. But the right of ownership passes all the same by transfer despite the arrest. Perishable things arrested may be sold by order of the judge.
 62. As to debts of one debtor arrested with others the effect is a stoppage of their payment by each other. If such other nevertheless makes unallowed payment he must repay. Nothing excuses such payment, not even fear of a suit, for a suit was impossible. Such third party must rather himself seek dissolution of the arrest. The debtor acts rightly and is protected, if on ground of such arrest he refuse to pay the third creditor, even on offer of security until judicial dissolution.
 63. Arrest has much in common with verbal citation in law, *e.g.*, it interrupts prescription, induces pendency of suit and prævention; unless the arrestor does not appear on the day appointed and thus abandons the arrest.
 64. Arrest does not with us give right of pledge or preference, except perhaps as to costs of conservation; nor does it impede subsequent legal hypothecs arising to the fief, to wards, and the like. It is otherwise in Saxony.
 65. For the way in which, and security on which, arrest is dissolved, Voet refers to his subsequent title 8 of this book. If arrestor does not provide arrest, arrestee prays absolution, costs, damages, &c.
 66. A citation in law is the foundation of all actions: without it all is void, *ipso jure*, even sentence obtained, even if such sentence be in favour of the uncited party.
 67. He who is cited for one cause is not compelled to respond for another; if however he voluntarily answers and contests the suit, the trial is good.

1. CITATION in law rests on the highest equity, lest any one should be condemned unheard; for to cite in law is "to call our adversary, for the purpose of trying our right, to him who is clothed with jurisdiction,"

l. 1, ff. h. t. (D. 2. 4.); *l. 2, ff. quis in jus voc. non iverit* (D. 2. 5.), and it is sometimes improperly called "to cite in *judicio*," *l. fidejussor 2, § prætor ait 2, ff. qui satisd. cog.* (D. 2. 8.); *l. 1, § ult. l. tutor pro pupillo 28, ff. de admin. et peric.* (D. 26. 7.), for citation could not be made to a petty judge, before whom, however, those who proceeded were properly said to proceed in *judicio*: there could only be vocation to him who was over the jurisdiction: arg. *l. quod si servum 3, § 1, ff. ne quis eum qui in jus voc. vi eximat* (D. 2. 7.), *d. l. 2, ff. si quis in jus voc. non iverit* (D. 2. 5.). And inasmuch as the adversary is to be called, so neither he who only brings a statement of his case (*libellus*) against another to the magistrate or Princeps, nor he who goes to the magistrate for the purpose of defending his case, can be said to be "cited in law:" *l. libertus 14 et 15, ff. h. t.* (D. 2. 4.). Any one may cite who has a legal right to appear in Court, whether it be a single person, republic, or a corporate body, the plaintiff being in such case named by them who preside over the corporation: *l. si municeps 2, 3, 6, 7, et tot. tit. ff. quod cujusque univers.* (D. 3. 4.).

2. In every citation in law, circumstances of place, time, and person must be taken into consideration, inasmuch as all cannot be cited, nor at all times, nor in every place. As regards place, although a defendant may be regularly cited from any place, even from the vineyard, the baths, or the theatre, *l. sed si etiam 20, ff. h. t.* (D. 2. 4.), yet because everyone's house is his safest refuge, and the church the safest refuge for all unfortunates, therefore it was ordered that no one could be cited into law from his own house nor from a church; nor was this a fraud on creditors, because, when the defendant lurked within the walls of his dwelling-house or of the temple, the creditors could be sent into possession of his goods: *l. plerique 18, 19, ff. h. t.* (D. 2. 4.); *l. fideli 2. l. præsentis 6, § sed si hoc 4 C. de his qui ad eccles. confug.* (D. 1. 12.). And what is laid down in the laws as to one's house you will also rightly extend to a ship, whenever anyone inhabits a ship as he does a house, having his domicile nowhere else than in the ship, arg. *l. pen. et ult. ff. de his qui effud. vel dejecerint* (D. 9. 3.) But this is only to be understood as to real citation in law, by which anyone is unwillingly removed or taken away from house and temple, for he or him who, remaining at home or in the temple, allows access to himself, a solemn announcement of action could undoubtedly be made, that he should appear in law either by himself or by an attorney, *l. satisque 19, l. sed etsi 21, ff. h. t.* (D. 2. 4.); *l. præsentis 6, § 1 et 3 in C. de his qui ad eccles.* (C. 1. 12.), and in this way Ulpian, commenting on the edict of the prætor requiring an announcement at the house of an absent person, says, "the prætor ought to order the announcement to be made delicately, not to drag the party from his house," and that to "announce at the house" must be so understood that even if he live in another's house he should be served with the announcement there.

3. In regard to time, it must be guarded against that no one shall

be cited in law while he conducts a family funeral, or follows a corpse, or pays respect to the dead; while a man marries a woman, or a woman marries a man; while he conducts a case before a magistrate, or necessarily has to stay in Court or in a certain place for the purpose of litigating a cause; or while he is trying a case as a judge: *l. in jus* 2, 3, 4, *ff. h. t.* (D. 2. 4.); arg. *l. 2*, § 1, 2, *ff. si quis caution. in jud. sist. causâ factis* (D. 2. 11.); nor is *l. contra pupillum* 54, § 1, *ff. de re judicata* (D. 42. 1.) opposed, for that is either only to be understood concerning a lawsuit commenced and pending before the prætor; or if it is even taken as referring to him who carried on a case, it does not say that the citing in law is then rightly done in respect of time, but only excuses from the pains of contumacy him who, having commenced a lawsuit before a lesser judge, abandons it because he is called to a higher Court; for he is not said to offend who, when he cannot appear in both, appears in one Court, and that the higher: arg. *l. si quis in gravi* 3, § *si cum omnes* 4, *ff. de Senatusc. Silan. et Claudian.* (D. 29. 5.). Nor can the high priest be cited while he is conducting a religious service, nor he who is carried in a public vehicle on the public service: *l. 2*, *ff. h. t.* (D. 2. 4.), concerning which see *Ravardus, lib. 2. varior. cap. 15*; *Cujacius, libr. 18. observ. cap. 29*. Nor can anyone be cited at a time when, on account of the religious nature of the place, he cannot be removed from there: *d. l. 2*. As regards this *lex*, its meaning is very uncertain, for some think that it ought to be so amended as to read "*inde removeri*" for "*inde se movere*," and therefore take the words as referring to those who had fled to the temples, and especially to the altars of the gods, for it is agreed these could not be thence removed, either under the Gentile or the Christian principles: *Ravardus libr. 1. varior. cap. 6*. Others put forward other conjectures and interpretations destitute of foundation, concerning which see *Wissenbach ad Pand. disp. 7. thes. 9*. I, however, take the reference of these words of the jurisconsult to be to him who had entrusted to him the custody of the sacred things, and who was called in law "*edituus*" aut "*hierophylacus*:" *l. annua* 20, § 1, *ff. de annuis legatis* (D. 33. 1.). For just as a priest, while he conducted the sacred service, so also the hierophylacus, while he devoted himself to the care of the temple and sacred things, was forbidden by religious obligation to go away from that place, and in both cases, therefore, religion equally dwelt there, as Mæcianus says: *l. neque infantes* 36, *ff. de fideicommiss. libertat.* (D. 40. 5.). Whence Ulpian joins both these in *d. l. 2*, *ff. h. t.* (D. 2. 4.), and the testator in *d. l. 20*, § 1, *ff. de annuis legatis* (D. 33. 1.). But nothing prevents any one being cited in law while he is going to another place for the purpose of conducting a funeral, or for the purpose of marrying, or while he is returning from there; and thus either before or after the solemn act which is wont to be performed in marriages and funerals, which is also to be observed, therefore, in those things acceding to religion: *Peckius de jure sistendi cap. 5. num. 12*.

4. With regard to persons who cannot be cited, some cannot be cited in any way at all, some not unless permission to sue be obtained; madmen cannot be summoned at all, nor infants, *l. quique 4, ff. h. t. (2. 4.)* but rather their tutors and curators; other minors cannot be otherwise summoned than aided by the authority of their tutor or curator: *l. in rebus 2. C. qui legit. pers. stand. in judic. (C. 3. 6.)*; if these be wanting, the plaintiff, when he has preferred the statement of his case (*libellus*), will rightly pray that a curator shall be appointed by a competent magistrate, to assist the minors themselves in the suit they are carrying on; or, according to usage nowadays, that the curator may be sued in the name of the minors, the infants, or the madmen: *§ item inviti 2. Instit. de Curatoribus (I. 1. 23.)*; *l. 1. l. admone eam 7. C. qui pet. tut. l. ait prætor 7, § sed etsi 2, ff. de minor. 25. annis (D. 4. 4.)*. But if it be a minor to whom *venia ætatis* has been granted by the Princeps, he may rightly be summoned, as a major, without doubt, whenever no controversy arises as to any immovable property belonging to him who is cited, through which controversy, by the sentence of the judge, the thing itself can wholly or partly be lost: *l. si actor 10, C. de appellation. (C. 7. 62.)*; for if the minor were rendered liable to the loss of the immovable thing by the action, he would not appear to be rightly cited in law unless the curator were a party to the lawsuit, being asked for and granted; since, notwithstanding the granting of the *venia ætatis*, he remained in the same position as other minors in regard to the alienation of immovables: *l. eos qui 3. C. de his qui veniam ætat. (C. 2. 45.)*; *Christianæus vol. 2. decis. 158. num. 3*. But since it has now become the custom in Holland that when *venia ætatis* is conceded, the free power of disposing of immovable things was also mostly conceded, it is justly to be laid down that he who has obtained *venia ætatis* can rightly be cited in *jus* without his curator whenever by the concession of the *venia* the free disposal of his immovables was granted to him: *Sande decis. fris. libr. 1. tit. 2. definit. 1*; *Groenewegen ad l. ult. C. qui legit. persona standi in jud. num. 4, 5, 6*.

5. Nor can the higher magistrates be cited in law, *h. l. in jus 2, ff. h. t. (D. 2. 4.)*, unless on account of a crime committed during the magistracy, and by reason of it: if, for instance, a venal sentence had been passed by him as to the law, or a penalty remitted for a price, or passed by vicious cupidity; if lastly, for whatever cause, any one can prove him to be a wicked judge, he is not prevented from advancing this even during his administration: *l. jubemus, 4. C. ad leg. Jul. repetund. (C. 9. 27.)*: as to other things, however, not committed during the time of, and by occasion of, his magistracy, the suit must be postponed until he has laid down office. So that in this way the reverence due to the magistrate may be the more preserved in integrity; for as his authority only lasted one year the loss from such a moderate delay does not seem to be so great to the complainant: *l. nec magistratibus 32, ff. de injuriis (D. 47. 10.)*. But as this honour was not accorded even by the Roman

law to the minor magistrates, and as the dignities and offices of the state nowadays are mostly not annual but perpetual, I think it has deservedly become the practice by our law, that no magistrate, whether temporary or perpetual, however high, is any more prevented by virtue of his dignity as magistrate, from being cited in law than any private person: *Instruct. Cur. Holland. art. 8, 12*; although as far as regards the form of citation there is some distinction between private persons and those sued by virtue of their office: *Groenewegen add. l. 2, ff. h. t.*; *Simon van Leeuwen paratitl. jur. noviss. libr. 2. part 1. cap. 7*; *Rittershusius ad novell. part. 9. cap. 11. num. 13*; *Paulus Voet, ad § ult. Instit. de pœna temere litig. num. 2*; *Vinnius ad § 12. Instit. de action. num. 5 in pr.*

6. But if *venia agendi* has been obtained from the prætor, parents may be cited, patrons, patronesses, and their children and heirs, even stranger-heirs: *d. l. quique, 4 § 1, et seqq. ff. h. t. (D. 2. 4.)*; *l. venia 2. C. h. t. (C. 2. 2.)* If any one acted contrary, he would be bound within the year by the action *in factum*, not by a popular action, but a private action, in a penalty of 50 aurei, to be devoted to the injured patron or parent; for if it had been a popular action Ulpian would have ineptly said, in *l. si libertus 12, ff. h. t. (D. 2. 4.)* that a *filius familias* cited without the permission of his patron, in the absence of his father, should be assisted, so that he might institute the action against the *libertus*: for according to the common law the *filius familias* could not be kept back from the popular action. Ineptly would he also have examined the point and determined in *l. pen. ff. h. t. (D. 2. 4.)*, that this action could not be given to an heir, for it is known that the popular action was not less competent to the heir, as one of the people, than to the deceased himself. This penalty ceases, however, if it repented him who cites, or if the cited one did not appear, or has been willingly cited: *l. quamvis 11, ff. h. t. (D. 2. 4.)*: so if a patron forced a freedman to swear as to not marrying; which oath was taken to be repugnant to the utility and favour of marriages, the freedman was not bound to observe such oath, but it was remitted to him by the *lex Julia*: *l. adigere 6, § lege Julia 4, ff. de jure patronatus (D. 37. 14.)*, where for "is permitted" ought to be read "is remitted," as may easily be gathered from the final words of the *lex*. [Here follows more as to "freedmen," which is omitted as being nowadays obsolete and inapplicable.] By our law this ordinary penalty of 50 aurei ceases, and only an arbitrary one obtains, and that not a heavy one, inasmuch as all who are cited without permission are absolved from the instance, the party citing them being condemned in the expenses: *Rodenburgh de jure conjug. tit. 8. cap. 1. num. 22. pag. 344. in pr.* Nor is the rusticity of those who cite without permission to be spared: *d. l. venia 2. C. h. t. (C. 2. 2.)*; nor the poverty of freedmen who, when unable from want to pay the fine, are corporally punished: *l. ult. ff. h. t. (D. 2. 2.)* Nor does the penalty of the edict appear to have vanished, or the necessity

of obtaining permission, on account of what once obtained under the laws of the 12 tables, but ceased in later times—a violent citation in law and laying on of hands, whereby those who were cited often suffered indignity: for not only did fear of violence, but also the respect due to parent and patron, recommend the obtaining of this permission: for as the person of parent and patron always ought to be sacred and honourable to children and freedmen, so that neither defamatory actions were to be granted against them, nor those which, on account of making mention of deceit or fraud, attacked their sense of shame: *l. parens* 5, § 1, *l. liberto* 9, *ff. de obseq. parent. et patron. præst.* (D. 37. 15.) Therefore the prætor had to estimate whether citation in law was to be permitted, or not, according to the varying nature of the action, whether it was against reputation or not: *l. sed si hac* 10, § *prætor ait* 12, *ff. h. t.* (D. 2. 4.) Nor should any one think that a verbal citation in law would not be subject to a penalty, because the penalty ceased if the parent cited did not appear, or appeared willingly: *d. l. 11, ff. h. t.* (D. 2. 4.) For it is to be considered that the penalty ceases, if he does not appear, because he has thus vindicated himself from contempt, or because he “was called, not unwillingly,” as the law has it, and therefore being cited with his own consent, he came willingly, himself desiring that the suit should be ended by judgment as soon as possible, as in the case *l. in tribus* 13, 14, *ff. de judiciis* (D. 5. 1.) But if he has not consented to the citation being made, but has been unwillingly called, and, being called, came, the penalty does not cease, both because there is no provision to that effect in the law, and because it is the case that an injury done to a father who is unwillingly cited, must be vindicated by the penalty of the edict. And although by our laws, and other laws, no civil trials are nowadays said to be wont by their nature to bring infamy to the condemned party, as I have said in *tit. de his qui not. infamia* (D. 3. 2.), yet as there can be no doubt that by the mention of deceit and fraud put forward and proved in law proceedings, the opinion held of the defendant summoned is blackened, the necessity for obtaining this permission, due on the score of respect, still remains, even nowadays; so that if any infamy should follow one who is condemned of a deed, it may rather be imputed to the authority of the judge than to the disrespectful citation of children: *Vinnius ad § 12. instit. de action. num. 5; Paulus Voet ad d. § 12. num. 4; Besoldus, deliberatis juris ad Pand. libr. 2. qu. 7; Christinæus, vol. 2. decis. 154. num. 9; Gudelinus de jure noviss. libr. 4. cap. 5. fere in pr. num. 4; Rodenburch, de jure conjugum tit. 3. cap. 1. num. 22.* From this there dissent *Donellus comment. libr. 23. cap. 2. post med.; Carpzovius de fin. forens. part. 1. constit. 2. def. 26.; Ant. Faber, Cod. lib. 2. tit. 2. def. 13; Costalius ad d. l. 3, ff. de his qui sui vel alieni juris.* Whenever therefore, without previous special order of the judge, sought by petition, the citation into law is accustomed to be made by the mere verbal calling of the officer of the magistrate (*apparitor*), clothed with a general mandate,

as it is mostly the custom to do before the inferior judges; a special permission to proceed is to be obtained from the judge beforehand when any one desires to bring a suit against his father. But if without a preceding order of the judge, obtained by petition, the citation in law cannot proceed (as is the received practice in the higher tribunals), it will suffice if in the same petition in which the liberty to proceed is prayed the common clause be inserted "subject to the permission to proceed beforehand sought." But even if this form having been omitted, the children have simply presented to the Court a petition for the purpose of seeking permission, not disguising the fact that they are children, and their parent their adversary, and if in this way the Court has granted the permission, the liberty of proceeding will thereby fully seem to have been obtained: *Gudelinus de jure noviss. libr. 4. cap. 5. fere in pr. num. 4*; *Groenewegen, ad l. parentes 6, ff. h. t. num. 2*. But with the Ultrajectines it has prevailed that permission to proceed ought to be sought with the nominate mention of the above formula: so that although petitions in which the permission to make citation is sought are prepared by the mere adnotation of the registrar (*grapharius*) without any special cognition by the Court itself, yet when this form of permission for proceeding is inserted, the wish of the applicant is not acceded to except on a mandate of the Court itself specially taking cognizance of it by an adnotation: *D. Someren de jure novercar. cap. 15. num. 1*; *Paulus Voet, ad § 12. Instit. de action. num. 4. in fine*.

7. "Parents" are, for this purpose, understood to be of both sexes—not only of the first degree, but of further degrees: and not only legal and adopted parents as long as the adoption lasts, but also natural parents, even mothers who have conceived without being married: *l. quique 4, § ult. l. 5. 6, 7, 8, ff. h. t. (D. 2. 4.)*: since the necessity of obtaining this permission is founded on natural reverence and piety towards parents; and in other branches also of our law the offices of piety are extended to natural parents, and to mothers who conceived without marriage equally with those procreating in legal manner, *e. g.* as to the giving of aliment among other things: *l. si quis a liberis 5, § ergo et matrem 4, ff. de agnosc. et alend. libris (D. 25. 3.)*; *Schneidwinus ad § 12. Inst. de action. num. 36 et seqq.* Nor does it matter whether the parents are of pure character or branded with any crime: for though they be wicked and contemners of the law, yet they are fathers, and therefore the children are not at all freed from the offices of piety and reverence: *arg. novell. 12. cap. si vero 2*. It does not matter whether the father or patron is to be cited in law in his own name, or as tutor, or curator, or defensor, or plaintiff or syndic of a *universitatis*: *l. sed si hác 10, § ult. ff. h. t. (D. 2. 4.)* But if a tutor to a patron is to be cited, he may be cited without permission, as is said in *d. l. 10, § ult. et l. licet famosæ 7, § ult. ff. de obseq. parent. et patr. præst. (D. 37. 15.)*: the consequence of which is that if the father be a madman, his curator is to be cited in law by his son; nor is there in such case any need to get permission to sue: *arg. d. l. l.*

8. Further, as Modestinus lays down the rule, those persons generally to whom respect is due cannot be cited in law without permission obtained: *l. generaliter*, 13, *ff. h. t.* (D. 2. 4.) I do not think this refers to anything else than that a similar honour must be paid to those who are like parents and patrons, of whom mention is made in the edict of the prætor; so that, as all cases could not be easily comprehended in the edict, the judge may extend the edict to similar cases, according to the general nature of laws: *arg. l. non possunt* 12, 13, *ff. de legibus* (D. 1. 8.) If, therefore, the inquiry be as to a father-in-law or mother-in-law, it seems they cannot be cited without permission; for not only do they, by affinity, fill the place of a parent (*l. quia parentis* 16, *ff. soluto matrimonio* (D. 24. 3.)), but paternal affection is also said to exist between a father-in-law and a son-in-law: *l. ult. ff. de his quæ ut indignis* (D. 84. 9.) and a father-in-law enjoys the *beneficium competentie* against his son-in-law equally as a father does against his son: *l. rei judicatus* 15, § *ult. et l.* 16, *ff. soluto matrim.* (D. 24. 3.), *l. pen. ff. de jure dot.* (D. 23. 3.) *l. sicut autem* 21, 22, *ff. de re judicat.* (D. 42. 1.). Nor do I think that a distinction is to be here drawn between affinity still existing and dissolved, as, following Jaso, Vinneus seems to say, *ad d. § 12. Instit. de action. num. 5. in med.*; for that distinction is neither strengthened by reason nor law. Rather is it an argument in favour of honour being accorded to a father-in-law, even after the marriage from which the affinity has arisen is dissolved, equally as while it lasts, that even when the marriage is dissolved the *beneficium competentie* granted to him is not otherwise to be denied than if he had fraudulently promised a dowry beyond the ability of the patrimony, or had wasted the dowry given him: *d. l. 16, ff. solut. matrim. de l. pen.* (D. 24. 3.) according to which must be limited what is generally laid down in *d. l. 21, ff. de re jud.* (D. 42. 1.)

9. The rule is clearly different in the case of a step-father and a step-mother; for although these are, by affinity, in the place of parents, in so far that marriage is on that ground prevented between a step-father and his step-daughter, or a step-son and his step-mother, and in that respect step-father and step-mother are placed on the same footing as father-in-law or mother-in-law in § *affinitatis*, 6 & 7 *Inst. de nuptiis* (I. 1. 10.,) *l. adoptivus* 14, § *ult. ff. de ritu nuptiar.* (D. 23. 2.) yet inasmuch as the second marriages of parents are very often considered injurious to the children of the first marriage, and thus no equal cause of affection is found towards a step-father or step-mother, who are taken without the consent of the children, as towards a father or mother-in-law willingly chosen, but rather step-parental hatred and evil instigations against the children of the first marriage, *l. non est enim* 4, *ff. de in off. testam.* (D. 5. 2.); and moreover the *beneficium competentie* is not found given to the step-father or step-mother as against their step-children, as it is to the father-in-law against his son-in-law or daughter-in-law: and as, lastly, step-children are not forbidden to bring the defamatory action of theft, or the accusation of plundered inheritance against the step-father or step-mother: *l. de his* 11, *C. de furtis et servo corrupto* (C. 6. 2.)

l. expilatae 2, l. si ævi 8. C. de crimin. expil. hæred. (C. 9. 32.): for all these reasons, therefore, you will not rightly extend what has been said as to parents and a father or mother-in-law, also to a step-father or a step-mother: *Vinnius ad d. § 12, de action. num. 5*; *Merula praxi civili libr. 4. tit. 24. cap. 12. num. 7*; *Fachæneus, libr. 10. controuv. cap. 89*; *D. Someren de jure novercar cap. 15. num. 1*. [Another reference by way of further confirmation of this doctrine is here made to the case of "freedmen," but the passage is omitted as being obsolete.]

10. As to a wife there is a greater doubt, not so much according to the Roman law as according to our law. For by the Roman law, by which women married to men were not prohibited from beginning and carrying on a lawsuit both against strangers and against their husbands, that permission to proceed was not necessary; for there is a perfect silence in the edict as to the wife; nor, anywhere in the law, is the reverence which the wife owes to the husband found assimilated to that which children and freedmen owe their parents and patrons; nay, the same honour and reverence,—on account of which the *beneficium competentie* is said to be due by the husband against the wife, and the defamatory action for theft is denied to the wife as against the husband,—is in turn due to the wife by the husband, and the same *beneficium competentie* and the same immunity from the defamatory action of theft is accorded to the wife: *l. nam in bonorum 2. l. 3, § 2, ff. de act. rer. amotar. (D. 25. 2.) l. alia 14, § 1. in fine ff. soluto matrim. (D. 24. 8.)* joined to *l. non tantum 20 in fine, ff. de re judic. (D. 42. 1.)* Unless, therefore, we wish to fall into this absurdity, that we should lay down that the husband requires permission to cite his wife in law, still less sufficient will the reverence due to the husband be for imposing on the wife, about to cite the husband, the necessity for seeking permission to proceed. But if you study the present laws of many nations, and especially of the Belge, it will rather be found that the wife who is about to proceed against the husband, *has* need of obtaining permission. For if even, according to the Roman law itself, an adoptive son was prohibited, on account of the paternal power, from citing the adoptive father without permission, *l. adoptivum 8, ff. h. t. (D. 2. 4.)*, the same principle ought much more now to obtain in regard to the wife, for she is so subjected with us by marriage to the marital power, so greatly increased, that she is bound by an equal or even stricter chain of that power, than by the Roman law, and especially are *filii-familias* by our modern law bound by the bonds of the paternal power; for the marital power extinguishes the paternal; nor is it limited by any limit of years or age; nor can any wife either act in law or out of law, do anything, or contract, without her husband's consent, and she is more bound to obey the wish and authority of the husband than of her parents. From all which, as it is not possible that other than the greatest respect is due by the wife to the husband, there is no reason why we should not attribute the same effect to the husband, in respect of the reverence so greatly due to parents, as regards the necessity of permission for his citation in law also: *Schneidewinus*

ad d. § 12. Instit. de action. num. 49; Rodenburch de jure conjugum tit. 3. cap. 1. num. 22. pag. 343 et seqq.: Perezius in cod. h. l. num. 2.

11. [After referring to the case of "vassals," omitted here as being obsolete:] It is the opinion of many that a subject cannot cite his ruler, as being as it were the common father of his country, nor the state as being his common mother; without permission to sue, arg. *l. 2. ff. de just. et jure* (D. 1. 1.); *Vinnius ad d. § 12, Instit. de action, num. 5. in fine; Schneidewinus ad d. § 12. num. 44; Andr. Gayl d. loco*: which, however, must not be extended to the officers and administrators of the State, such as the keepers of the treasury, the patrons and procurators of the fisc, and the like, in matters relating to their office; for it is common practice that these may be cited in *jus*, simply and without permission sought: *Consult. Jctor. Holland. part 4. consil. 133.*

12. Concerning præceptors and servers at the baptismal font and also rev. "brothers," it is almost unnecessary to inquire, because these can only in particular cases be compared to real parents: beyond those causes they ought clearly to use an entirely different law from that of parents. For although, according to the *lex Ælia Sentia*, it was a just cause of manumission if a minor, over twenty years, wished to manumit a parent, a brother, or a teacher, § *justæ autem 5, Instit. quib. ex causis manumitt. non licet* (I. 1. 6.), and although marriage was forbidden with a server at the font, as being a spiritual parent, equally with a natural parent, *l. si quis alumnam 26. in fin. C. de nuptiis* (C. 5. 4.), the conclusion will be rashly thence drawn that these cannot be cited without permission.

13. As regards the form and mode of citing; although of old there could be both a verbal and real citation in law, at the private discretion of everyone citing, without any peculiar judicial authority, so that the plaintiff could draw the defendant into law by his twisted neck, unwilling, reluctant, imploring the populace, and wailing or crying aloud, calling the citizens to his help, to lend their assistance to the unfortunate and innocent, and help the poor: as to which custom see *Gellius, Noct. Attic. libr. 20, cap. 1; Rævardus ad leg. 12, tab. cap. 5, et cap. 3. pag. mihi 18; Carol. Sigonius de judiciis libr. 1, cap. 18; Rosinum antiquit. Rom. libr. 9. cap. 12*, yet afterwards it became the custom to cite by the authority of the judge; not only as regards that which was to be litigated, as propounded in an edict, but also that which was to take place verbally, for under the Grecian Emperors defendants began to be cited by apparitors representing the judge; so that the apparitor, having received the statement of summons from the plaintiff took it to the defendant, and the defendant subscribed on it on what day it was presented to him: *novell. 53. cap. illud quoque 3, § 1. 2. novell. 79. cap. 3. novell. 96. novell. 112. auth. offeratur C. de litis contest. (C. 3. 9.), § tripli 24, Instit. de action. (I. 4. 6.), l. ult. C. de annal. except (C. 7. 40.) C. de præscript. 30. vol. 40. annor. (C. 7. 39.)*. From this mode of citing our present customs do not much differ; there being, however, some

distinction between superior and inferior tribunals. Citation in law to the higher tribunals, or provincial Courts, cannot be otherwise made than if the plaintiff, having preferred his written statement of the case containing a short narration of the thing to be litigated, prayed and obtained a rescript by which the liberty of citing his adversary was conceded to him, citing him to appear at a convenient time, not too near by, and not too far off, but fixed by the custom of every place. On the other hand, in the inferior tribunals the plaintiff, without any previous petition, causes the defendant to be summoned by an apparitor, who seems to be clothed with a general mandate from the judge. Whether, however, the apparitor cites the defendant in law by special mandate, or by a general one, it is, above all, necessary that he discharge his duty and make the citation within the territory of that judge with whose mandate he is clothed; for he may be disobeyed with impunity if he cite beyond his territory: *l. ult. ff. de jurisdictione* (D. 2. 1. ante, Part II.), even if he who is cited when he is beyond his territory may have his domicile in the territory of the judge whom the apparitor represents; for that judge himself is a private person in the territory of another judge: *l. ult. ff. de off. præf. urbi* (D. 1. 12.). *l. 8, ff. de officio offic. præsidis* (D. 1. 18.), and so also are his officers and criers; *Johan. Papon. libr. 6. tit. 7. arrest. 13; Jul. Clarus sent. libr. 5, § fin. quæst. 81. num. 19; Paulus Voet de statutis sect. 10. num. ult.* This being done, it is then necessary that he shall serve on the defendant a copy of the mandate, citing in law, if there be one; otherwise either a general libel of citation, that the defendant, if he do not satisfy the plaintiff, shall appear on a certain day to hear the claim of the plaintiff; or else a specific claim of the plaintiff, and also copies of those instruments which the plaintiff will use on the appointed day, to obtain provisional sentence (*provisie van numptisement*), suitable terms of such provisional payment being laid down. All this will be more fully and perfectly learned from the daily practice of the tribunals and the documents of the cases themselves, according to the custom of each Court, in which any one may labour to carry on his uncrude studies with advantage, as Justinian says in a similar matter, *§ pen. Instit. de satisfactionibus* (I. 4. 11.); see meanwhile the *Instructions of the Courts*; *Simon van Leeuwen cens. for. part 2. libr. 1. cap. 23. num. 6, 7, et paratitl. juris noviss. libr. 2, part 1. cap. 7. num. 2; Wassenaar proct. judic. cap. 1. num. 30. et seqq. et num. 38.* If the apparitor on going to the house of the defendant for the purpose of making citation, cannot make the announcement and service, the defendant himself being then perhaps absent, it will suffice that he explain it to the servants of the defendant, or his manager, or if none such be present, to his major neighbours, or lastly, if there be even no major neighbours, it will be advisable to leave the libel at his house or to affix it to his doors or gates, so that the defendant, being warned in this way, may appear: *l. dies 4, § prætor ait 5. et § 6, ff. de damno infecto* (D. 39. 2.) *Instructio*

Curia supremæ art. 105, 106; *Curia Brabantinæ* art. 386, and see these elaborately set out by *Tyraquellus de retract. gentilitio* § 9, *gloss.* 2.

14. These things being done the citation in law will be valid even if it be proved that the citation did not come to the notice of the defendant himself; for it is the fault of the defendant himself that he left no representatives at home, or negligent domestics who did not report the announcement made: although restitution will not seem to be denied if the defendant can shew a most just cause of ignorance, removed from all negligence: *arg. l. non enim* 16. *et l. sed si* 26, § *adversus* 1, *ff. ex quib. caus. majoris* (D. 4. 6.); *Tyraquellus de retractu gentilit.* § 9. *gloss.* 2. *num.* 89. *et seqq.*; *Christineus ad Leg. Mechlinienses tit.* 13. *art.* 7. *num.* 8; *Mynsingerus cent.* 2. *observ.* 69. On the other hand if anything which had to be observed in the citation in law has been neglected, either some error of form, or the time of appearance being fixed too near by, or too distant, or some error in the name and designation of the plaintiff, or the defendant, or the judge, then the citation will be of no force; nor will the defendant who does not satisfy it be called contumacious or a delayer; and whatever has followed on such useless citation will be of no force, quite as much as if the citation in law had been entirely wanting: even if perhaps another had received as to himself, the citation for him who had not been, but was to have been cited, and had promised that the other would appear; because it is clear that he was not cited: *l. ea quæ* 7, *C. quomod. et quand. judex sent. proferre debeat* (C. 7. 43.); *Andr. Gayl. libr.* 1. *observat.* 48. *num.* 8; *Mynsingerus cent.* 5. *observat.* 50. *num.* 1, 2; *Ant. Faber Cod. libr.* 2. *tit.* 2. *defin.* 8. Unless indeed he who not being legally cited, and who could therefore have contemned the citation and remained away, willingly appeared: for in this way the invalid citation was strengthened and confirmed, so that it is received in practice that he who appears cannot put forward the exception of illegal citation: and this is supported by what Ulpian says in *l. l.* § 1, *ff. ne feriis* (D. 2. 12.), that if the prætor persisted, through stupidity or negligence, in citing litigants in time of holidays, and they willingly came, and if he pronounced sentence in the presence and with consent of the litigants, the sentence would be of force, although he who had cited them had not acted rightly; but if they had persisted in absenting themselves, the sentence would be of no force. For that will be made valid, when the litigants satisfy it, which would have been useless if, using their right, they had persisted in remaining away: *Andr. Gayl. d. libr.* 1. *observ.* 48. *num.* 4. *et observ.* 58; *Radelantius Cur. Ultraject. decis.* 109; *Mynsingerus cent.* 2. *observ.* 18. *num.* 3, 4; *Ant. Matthæus de judiciis disp.* 6. *thes.* 85; *Consult. Ictor. Holland. part.* 3. *vol.* 2. *consil.* 109. *num.* 1; *Henr. Kinschot respons.* 88. *num.* 86. (*in editione ann.* 1658, *Respons.* 98. *quest.* 6. *num.* 86.).

15. Last, however, those who have many debtors,—bound to them from the same or different causes, which debtors they are not prohibited from citing, on account of prorogation made, or any other cause, to the

provincial Court, passing by the inferior judge,—should be burdened with too much expense, if they had to obtain a new rescript for citing them singly in law, it has been received in practice for the sake of shortness, that the creditor can, on the presentation of a petition, pray and obtain from the Court a general rescript, whereby the liberty is conceded to him of summoning several debtors, not only at the same, but at different times, as many as could be summoned to the Court in the first instance, omitting the inferior Court (it is commonly called a *mandament of debts*): which general rescript of the Court is of force only one year, computed from its grant: nor by virtue of it can others be cited than those who were debtors at the time of rescript obtained: so that a citation thus made after the year, by virtue of such rescript, is of no effect, as also is a citation for payment of a debt which is only born, and which has only become due after the date of the obtained rescript: *arg. l. non potest videre 23, ff. de judic. ordonn. en instructie van den Hove van Holland in kleyne saken, 21 Dec. 1759. art. 6. vol. 2. placit. Holl. pag. 762; Instruct. Curiae Brabant. art. 479; Willem van Alphen's papegaay, part. 1. cap. 2; Wassenaar pract. judicieel, cap. 1. num. 35.*

16. Besides the simple citation in law, which is made by the mere announcement of the apparitor, there is another which is completed by three edicts, or one peremptory edict, publicly proclaimed, a trumpet-call being added according to our custom: *l. edictum 55. l. ad peremptorium 68 et seqq. ff. de judiciis (D. 5. 1.); Instructio curiae suprem. art. 106; Curiae Brabantinae, art. 888, 889; Flandrica, art. 223: in which way absent criminals are to be cited, according to the prescript of Marcianus in l. 1, § præides 2, ff. de requirenda vel absentibus dammand. (D. 48. 17.)* So also are to be summoned those summoned by an *actio in rem*, when they are absent from that place in which the immovable is situated: *Groenewegen ad l. un. C. ubi de hereditate*, even if they are in such a position that they could not appear in that place, being perchance banished from that place, under capital or other arbitrary punishment, and yet having goods situated there, concerning which goods a lawsuit was to be brought: although then the form is changed and they are ordered to appear by a substitute authorized by mandate: *Rodenburch de jure conjug. tit. 3. cap. 1. num. 16. post. med.* Those also who have given their aid to litigants having their domicile in another territory, by conducting causes for them or being procurators, cite them thus in law for the obtaining of their recompense: for since no one can better judge as to the justice of the recompense due, than he who was judge of the principal suit carried on, it obtained in Holland that clients resident elsewhere should be called to that judge even although none of their goods could be burdened with arrest: as witnesses: *Van Alphen Papegaay, part. 1. cap. 2. van mandament van debitis in notis pag. mihi 72.* And whenever the place in which the defendant to be cited resides, is under the jurisdiction of the judge to whom he is to be cited, but citation would not be safe for the apparitor on account of enemies lurking about,

or his ability to cite, in that case the edict is to be propounded in the nearest safe place: *Clementin. cap. dudum 1. de judiciis; Mynsingerus cent. 2. obs. 69. in notis; Van Alphen Papegaay part. 1. cap. 2. libello 1. et in verb. Mandement van debitis, in fin.* Also if any one has by himself or by others in any way been the means that the citation should reach him: *d. clement. cap. statuimus 13. de offic. et potest. jud. delegati in 6. clement. unic. de foro compet. clementin. cap. causam 3. de electione et electi potest.* Or if the party to be cited be a wanderer, having a fixed domicile nowhere, in which case the edict is to be put forward in that place he is wont to be most frequently: *arg. l. dies 4, § toties 6, ff. de damno infect. (D. 39. 2.); l. ejus qui 27, § Celsus 2, ff. ad municipal. (D. 50. 1.)* Lastly, wherever uncertain persons are to be cited, or when creditors of a deceased person are cited, that they may be present at the making of the inventory, or when their number or names do not sufficiently appear; or when they are cited on account of a judicial decree to be interposed as to the delivery of immovables, to assert any right they may wish to put forward for themselves concerning the goods to be delivered: *De his vide Andr. Gayl. libr. 1. observ. 57; Simon van Leeuwen cens. forens. part 2. libr. 1. cap. 23. num. 3, 16, 17.*

17. The most rigid way, however, of "citing in law" is that which is interposed by the detention of the person or thing, by authority of the judge, so that neither can the person depart from that place, nor can the thing be alienated nor transferred beyond the territory of the judge, until the adversary is satisfied or secured. This is commonly called a *real citation* in law, and, by a barbarous term, "*arrest.*" Nor is it doubtful that it finds place in criminal cases, so far that, in the case in which any one can be summoned for a crime in two places, say at his domicile and at the place where the crime was committed, the real citation is to be considered more powerful than the verbal; although this is older than the real, as where having, perchance, been verbally cited in the place of the committed crime, the defendant is apprehended and arrested in the place of his domicile; nor does he seem to have been first who first cited, unless from the circumstances it appear that the defendant willingly so acted and contrived that he should be elsewhere detained for the sake of perhaps avoiding a heavier punishment: *Jul. Clarus sentent. libr. 5. et fin. quæst. 34. num. 7; Damhouderus pract. crimin. cap. 33; Farinacius oper. criminal. libr. 1. tit. 1. quæst. 7. num. 3; Jacobus Coren consil. 30; sed de his latius tit. ff. de accusation. (48. 2.) et tit. de judiciis (5. 1.)*

18. With regard to civil matters, it is to be borne in mind that the object of arresting is twofold; for persons or things are either arrested for the sake of founding jurisdiction, or for the sake of conserving the thing or the debt. Persons are arrested for the sake of conserving the thing or the debt, whether strangers or non-strangers, subject, without any detention, to the judge, by whose authority they are detained, as where they are perhaps suspected of flight, *Mævius de arrestis cap. 6. n. 2. et*

segg, and the same obtains as to their movables where there is fear of clandestine removal; in this way, for example, things carried and brought into a country or town property, or produced there, can be kept in arrest on the petition of the lessor; and the debtor of a debtor can be served with notice by the creditor, at the instance of a judge, that that he shall not pay until the serving creditor is satisfied; this is generally known. But if there be no fear of removal, but only of dissipation through prodigality, the detention of the goods will not seem to be conceded to the creditor, but the endeavour should rather be that the alienation of goods should be interdicted: *Peckius de jure sistendi cap. 16. num. 1. 2; dissent. Mævius de arrestis cap. 6. n. 9.* As this detention, and laying on of hands, only takes place in security of the creditor in danger as to his debt, and has necessity as its foundation, we must not at all go contrary to the reason and the principles of the Roman law; the rather ought the proceeding to be considered as drawn from the Roman law, and, with excellent reason, applied to our needs. For thus it was allowed by the Roman law to detain a fleeing debtor and his things, not only by the authority of the judge, but also by private authority: *l. ait prætor. 10, § si debitorem 16, ff. quæ in fraud. credit. (D. 42. 8.), l. 1. C. ubi quis de curial. vel cohort. aliave condit. conven. (C. 3. 28.);* thus when a debtor hid, creditors were placed in possession by the authority of the judge: *tot. tit. ff. quib. ex causis in poss. eat. (D. 42. 4.) et tit. ff. de reb. auctor. jud. possid. seu vend. (D. 42. 5.).* Thus, lastly, a suspected defendant was ordered to deposit in a sacred building or with a trustee (sequester), the movable concerning which the suit was brought, and which might be made away with by him, until security was interposed or the suit was brought to an end: *l. si fidejussor 7, § ult. ff. qui satisd. cog. (D. 2. 8.);* "and as it was better," thought the Emperors, "to prevent in time, than to vindicate after the event had happened, better to preserve the rights intact, than to seek a remedy after the wounded cause had arisen": *l. 1. C. quando liceat unicuique sine jud. se vind. (C. 3. 27.) l. ult. in fin. C. in quib. caus. restit. in integr. necesse non est (C. 2. 41.),* so also it was better, for a similar reason, in time to prevent flight and removal of goods, by having recourse to detention, than afterwards often in vain to implore the help of the judge against injury done by flight or removal of the goods. Add to this, that in these cases the detention of things or of persons suspected of flight, is to be ascribed to a vigilance of creditors, which was very much praised and approved by the Roman law: *l. quod autem 6, § sciendum 7. l. pen. in fin. ff. quæ in fraud. creditor. (D. 42. 8.); Rebuffus ad constit. regias tom. 1. de literar. oblig. art. 6. gloss. 8. num. 42; Sim. van Leeuwen cens. for. part 2. libr. 1. cap. 15. num. 2; Petrus Bort tract. pan. arresten cap. 1. num. 14.*

19. And since this kind of arrest is had recourse to on mere necessity, and only for the sake of security, and therefore is neither so hard nor so odious, hence it has place in regard to many of those persons

who otherwise are prohibited from being disquieted by arrest, on the ground of privilege, either in respect of person or goods: *Simon van Leeuwen d. cap. 15. num. 8*; *Roseboom costuymen van Amsterdam, cap. 19. art. 19. et seqq.*; *Bort van arresten cap. 4. num. 45*; *Consult. Jurisc. Holl. part 1. consil. 238*. Not only has it place before the lawsuit is contested, but even afterwards during the suit, and in every part of the trial, whenever a suspicion of flight, or of frustration of the suit, arises; for although during a suit nothing is to be altered: *tot. tit. ff. nihil innov. appellat. interpos. (D. 49. 7.)*; *tit. C. in integr. rest. postul. ne quid novi fiat (C. 2. 50.)* yet, lest trials should, after being commenced, be frustrated by flight, or by removal of the thing, security is rightly taken by medium of arrest, until there is the security that the judgment will be satisfied. And certainly, as a detention of persons and things is rightly prayed by the creditor from the judge on these grounds, before the lawsuit is contested, and as no one by contesting a suit can make his condition worse, but often better, *l. non solet 86. l. nemo enim 87, ff. de regul. juris (D. 50. 16.)*, this prayer of the plaintiff cannot be considered as unjust after the suit has been contested, wherever a cause of suspicion then emerges: *arg. l. apertissimi 16. C. de judiciis (D. 8. 1.)* joined to *l. Julianus 17, ff. eod. tit. (D. 5. 1.)*; *Peckius de jure sistendi cap. 4. num. 5*; *Bort van arresten cap. 4. num. 60*; *Berlichius part 1. concl. 73. num. 57*; *Radelant Curiae Ultraject. decis. 73*. Nor is it only allowable in that place, and by the authority of that judge, where, and before whom, the lawsuit is pending, but it is also allowed in another place, and by the command of another judge; not with the object that a suit elsewhere pending should be ventilated again in the place of arrest, but only that suitable security, in security of the suit elsewhere pending, should be interposed: *Bort on arrests cap. 8. num. ult.* Even in those very places in which the power of detaining your opponent for the purpose of strengthening jurisdiction is not wont to be conceded, such liberty of detention is nevertheless not denied for the sake of preserving the thing, until your opponent has furnished sufficient security: as in *Frisia. Sande decis. Frisic. libr. 1. tit. 17. def. 2, 3*. Besides, when the things of the debtor are already detained by arrest, there is nothing which prevents that the debtor himself should be also arrested for greater security, and, on the other hand, that when the debtor himself is apprehended, his goods also should be detained; for these two remedies are not mutually subversive of each other, but both tend to the same end, namely, security; nor when one way of execution is tried can the other be prohibited, so that we may sooner and more fully obtain our debt: *Argentæus ad consuet. Britann. art 122*; *Peckius de jure sist. cap. 4. num. 19*.

20. For these reasons, indeed, they also can be arrested who can not, as yet, be effectually summoned by action to make payment; when an obligation which has begun to have being is suspended by the addition of a day or condition which has not yet arrived; so that the day of the

obligation has not yet vested, or has vested, but has not yet arrived; or when a debtor suspected of flight, can repel the plaintiff by a dilatory exception, as that of a pact not to sue within a certain time, or of order or excussion in the case where anyone, bound in a fidejussorial capacity, has not renounced that benefit, and the principal debtor has not yet excussed. For although the right of seeking payment is not yet born to the creditor, yet the liberty of obtaining security is not denied him. For which reason, when houses are let and the day of payment of rent has not yet arrived, still a pledge given in respect of things carried and brought in, pledged for payment, may be prosecuted, because it was to the advantage of the lessor: *l. quæsitum* 14, *ff. de pign. et hypoth.* (D. 20. 1.), and in transactions *bonæ fidei* it is received in practice, that while the condition of the debt is pendent, the debtor, on the cognition of the cause by the judge, can be forced to interpose a deed of surety in the way of security, *l. in omnibus* 41, *ff. de judiciis* (D. 5. 1.), which also so obtains in legacies with suspensive conditions, although their nature is "*stricti juris*," *tot. tit. ff. ut legat. vel fideic. serv. causa caveatur* (D. 36. 3.), notwithstanding *l. grege* 13, § *si sub conditione* 5, *ff. de pign. et hypoth.* (D. 20. 1.), where, during the pendency of the conditional principal debt, the prosecution of the pledge was denied, however unconditional. For I think that the general terms of that *lex* ought to be restricted to debts on a conditional transaction *stricti juris*, in respect of which only, can it be said that nothing is meanwhile due; for, as in transactions *bonæ fidei*, suspended by a condition, security meanwhile is due, *d. l.* 41, so also in a conditional hypothec, constituted for an unconditional debt; for since it is reckoned among transactions *bonæ fidei* it has this in common with such transactions, that it can be rightly sued for during the pendency of the condition, and at the discretion of the judge security is interposed as to the restitution of the hypothec if a condition existed and the debt is not paid: *d. l.* 13, § 5, *ff. de pignor. et hypoth.* (D. 20. 1.). And as by the custom of all nations (or if not all, at least the more celebrated) which followed the Roman law, the distinctions between trials *bonæ fidei* and *stricti juris* have vanished, and are not wont to be considered, and as even in legacies *stricti juris* the same obtains in this respect, according to what has before been said; so not the less does the reason of equity favour the security of the creditor in both kinds of obligations; therefore there can be less difficulty remaining according to our laws as to *d. l.* 13, § 5: see *Peckius de jure sistendi d. cap.* 4. num. 6, 7, 8, 9; *Rodelantius curiæ ultraject. decis.* 18. num. 1; *Carpzovius defin. forens. part* 1. *constit.* 29. *defin.* 30; *Berlichius conclus. pract. part* 1. *conclus.* 74. num. 26, 27, 28; *Sim. van Leeuw. cens. for. part.* 2. *libr.* 1. *cap.* 15. num. 9, 10, 11. From which it also follows that by this kind of arrest, pendency of the suit is not brought about: *Mævius de arrestis cap.* 15. num. 37 *et seqq.*

21. But not otherwise do these arrests seem to be customarily interposed, for the sake of preserving the thing, than where only the debt

contracted, a new suspicion of flight or of a removal of the goods has emerged; for if it already existed in the beginning, the creditor has to impute it to his own rashness, that he thought of contracting with such an one: *arg. l. si is, a quo* 3, § *ult. et l. 4, ff. ut in possess. legator.* (D. 36. 4.); *l. qui bona* 13, § *de illo* 6, *ff. de damno infecto* (D. 39. 2.); *Andr. Gayl. libr. 2. obser. 44. num. 5; Peckius de jure sistendi cap. 5. num. postremo 24, 25; Berlichius concl. pract. part 1, conclus. 73. num. 57; Mævius de arrestis, cap. 6. num. 16, 17. et cap. 8. num. 143 et seqq.*

22. So far then as to arrest or detention which happens for the sake of security, from necessity. But if it only occur for the purpose of strengthening jurisdiction, it does not then proceed from necessity, but rather from utility only, that there may be a greater facility to creditors for summoning their debtors resident under another judge, and that they may litigate at the place of their (the creditors') own domicile, with less expense and trouble; for if they were without this remedy they would be bound, as plaintiffs, to follow the forum of the foreign debtor, and at the expense of their estate, and at a larger cost, to be absent from the place of their domicile. And this not only seems to be introduced in favour, and for the sake, of commerce, so that everyone may more freely and liberally contract with foreign merchants, inasmuch as he would contract with more difficulty if, wanting this power of detaining them, he would have to force them to payment in their own proper forum: *Peckius de jure sistendi cap. 2. num. 5, 6; Sande dec. Frisic. libr. 1. tit. 17. defin. 3; Petrus Bort. tract. van arresten, cap. 1. num. 13; but also for this reason, that by the defined limits of our jurisdiction, and especially of our patrimonial jurisdiction, no one can now be summoned at the place of contract or of intended payment, unless he is found there; and for the sake of relieving this inconvenience, this right of detaining, both in respect of person and thing, seems to have been had recourse to by the magistrate of every territory, especially when they had noticed that it would not a little conduce towards increasing the range of their jurisdiction: Groenewegen ad l. unic. C. ubi conven. qui cert. loco dare promisit; whence this kind of arrest has not only been received in the whole of Belgia, if you except Friesland, but also prevails throughout all Gaul and Germany, according to Rebuffus, ad constit. reg. de literarum obligation. art. 6, gloss. 3. num. 42. in fine et 43; Henric. Kinschot, de re-scriptis gratiæ tract. 1. cap. 8. num. 3; Andr. Gayl. de arrestis, cap. 1. num. 12; Sande dec. Fris. libr. 1. tit. 17. defin. 3; Mævius de arrestis, cap. 3. num. 22, 23.*

23. The rationale of this mode of citation in law departs from the principles of the Roman law, according to which not only was the plaintiff bound to follow the forum of the defendant at whatever place he was staying: *l. juris ordinem* 2. *C. de jurisdic. omn. judic.* (C. 3. 13); but he was forbidden from beginning the suit by execution: *l. 1. C. de executione rei jud.* (C. 7. 53.); all sequestration being quiescent, he was directed, following the order laid down by the law, first to get judgment

against the debtor, and only then, when convicted and condemned, to force him to payment: *l. unic. C. de prohib. sequestr. pecun.* (C. 4. 4.); not to mention that it pleased the old Romans to proceed more leniently with strangers in citing them by law than with citizens, and that the case of the former was therefore more favourable than that of the latter; so much so that although it was allowed to one citizen to seize another by his twisted neck and to drag him if refractory, the "*decemviri*" did not allow a stranger—who was said to be "*an enemy*" (*hostis*) to them—to be dragged into law, but only a day to be fixed or proclaimed and announced to him: *Rævardus ad leg. duod. tabul. cap. 5 in fine.*

24. And as the liberty to arrest can be sought and obtained from the judge in every place, even although the judge be not sitting in Court, *teste Carpzovius defin. forens. part 1. constit. 29. def. 15*; *Mævius de arrestis cap. 13. num. 16 et seqq.*, so also the arrest itself may be made everywhere; even in the public road, or in the temple, if the fear of escape should need it: *Mævius d. tract. cap. 14. num. 14*; with this exception, laid down with us, that no one can be detained by arrest in the camp on account of debt not contracted in the camp itself, but elsewhere: *Placaat rakende alle leger personen, anno 1631, 7 Maji art. 12. vol. 2. placit. Holl. pag. 185*; and that those who have the right of asylum may offer a refuge to the debtors without any fear of arrest; as is the case at Vienna, and the other places mentioned by *Van Leeuwen, censur. forens. part 2, libr. 1. cap. 15. num. 35*. And it is more correct to hold that arrest may be made at any time, whenever there is danger in delay, and therefore nothing prevents the persons and goods of debtors being seized on secular or sacred holidays, nay, even on Sunday; nor even that things detained by one creditor should be entrusted to another, lest, the first arresting creditor being settled by satisfaction of his debt, or security given, the bond of arrest should be loosened on these sacred holidays themselves; for it is generally received that everything can be done on those days which will not tolerate even a little delay without danger: *arg. l. 1. § ult. et l. pen. ff. de feriis* (D. 2. 12.); *l. pen. C. eod. tit.* (2. 3. 12.); *Costhuymen van Antwerp, tit. 27. art. 19*; *Rebuffus ad constit. reg. tract. de literarum obligat. art. 6. gloss. 3. num. 60*; *Peckius de jure sistendi, cap. 10. num. 1*; *Christineus vol. 2. decis. 158. num. 11*; *Carpzovius defin. for. part 1. constit. 29. defin. 16*; *Groenewegen ad l. fin. C. de feriis num. 5*; *Ant. Matthæus de auctionibus libr. 1. cap. 6. num. 22*; *Petr. Bort, van arresten. cap. 3. num. 18. et cap. 6. num. 7*; *Mævius de arresto, cap. 11. num. 3 et seqq.* Nor is the night-time any impediment in this respect, for what is done from midnight to the following midnight is considered as done in open daylight, and any hour of the day: *l. more 8, ff. de feriis* (D. 2. 12.); *Costuymen van Antwerpen d. tit. 27. art. 20*; *Christineus d. vol. 2. decis. 158. num. 12*; *Peckius de jure sist. d. cap. 10. num. 2*; *Carpzovius d. part 1. constit. 29. def. 16*; *Mævius d. cap. 11. num. 6*; *Bort d. tract. van arresten, cap. 3. num. 18. et cap. 6. num. 8*. During the time of the larger privileged market-days, however, impecunious debtors could

not be arrested, as I shall shew more fully in *tit de nundinis* (*post, tit. 50. 11.*)

25. This right of arrest for strengthening jurisdiction is not, however, admitted in all cases, but only when any one is bound by personal action, on contract or quasi-contract, delict or quasi-delict, and other like kinds of cases, to give anything to his adversary, to do anything, or furnish anything: *Costuymen van Utrecht rubric. 19. art. 1 et 3; Peckius de jure sist. cap. 5. num. 21; Bort van arresten, cap. 1. num. 16. et seqq.* or can be said, by an action *in rem*, to restore a movable; for as a movable is not bound to any place, the debtor can restore it in any place where the thing itself or the possessor of the thing is detained: *arg. l. si res mobilis 10 et seqq. ff. de rei vindicat. (D. 6. 1.)*; *Rebuffus d. tract. de literar. obligat. art. 6. gloss. 3. num. 62; Peckius d. cap. 5. num. 21; Christineus, vol. 2. decis. 165; Mævius de arrestis, cap. 9. num. 62. et cap. 8. num. 2*; or, lastly, when one is not summoned as a debtor, but only as a witness, or as a magistrate's officer (*apparitor*), or as a notary to depose to the truth of acts done, whether the proceeding then be a personal action or a real action, concerning a movable or immovable: *Peckius de jure sist. cap. 4. num. 15; Mævius de arrestis cap. 6. num. 30 et seqq.; Petrus Bort, van arresten, cap. 4. num. ult.* Clearly in actions *in rem* for an immovable, the possessor of the thing cannot be detained so as to bind him to litigate in another place and before another judge than him in whose territory the thing is situated. For although there is a question whether the action *in rem* can be brought only at the place of the situation of the thing, or also in the place of the domicile of the possessor, in which case in no event would there be necessity for arrest; yet it is not at all to be allowed that by means of arrest direct on the person or thing of the possessor, he should be forced to litigate as to an immovable thing elsewhere situated, and possessed by him; both because, according to what has been already above said, the *rationale* of arrests introduced for the purpose of founding jurisdiction, most of all refers to actions *in personam*; so, namely, that strangers contracting with us may be summoned in those places where they are found or have goods, as they, on account of defined limits of jurisdiction, and often also on account of the absence of a supreme Princeps common to plaintiff and defendant, cannot be compelled to make payment in the place of contract unless they should be found there; and also because, not even according to the Roman law itself, could an action *in rem* as to an immovable be brought elsewhere than in the place of the situation of the immovable, or at most, according to some, in the place of the possessor's domicile, but nowhere else (as to which see my title, *de judiciis, post. tit. 5. 1.*); even though all Roman citizens were then subject to one Princeps, whether they were resident in Italy or in any of the provinces: *l. 2. C. ubi in rem actio (C. 3. 19.)*; *Stockmans Curiae Brabant. decis. 136; Peckius de jure sistendi cap. 5. num. 21. et cap. 4. num. 25*; which Neostadius also lays down, *Cur. Supr. decis. 83. et Cur. Holl. decis. 55.* But rather is it the

practice, if the possessor of the immovable has his domicile elsewhere, that by means of arrest laid at the place of situation of the immovable, he should be forced to bring the suit there as to such thing: *Groenewegen ad l. unic. C. ubi de hereditate* (C. 3. 20.) But if anyone have both a real and a personal action, as an hypothecary creditor, to whom an immovable is specially bound, he cannot, by an intervening arrest, accomplish this, that the hypothecary action can be discussed elsewhere than in the place of the situation of the immovable; but there is nothing to impede his detaining the debtor, or his goods not otherwise bound, in any other suitable place, so that he there may contend with his debtor in a personal action as to the principal debt: *Sim. van Leeuwen cens. for. p. 2. libr. 1. cap. 15. num. 34*; which is especially true in those places where it is in the creditor's discretion whether he first bring a personal or a hypothecary action against his debtor. As to which see our *tit. qui pot. in pignore* (*post, tit. 20. 4.*)

26. Nor is it admitted in *all* personal actions that, by means of an intervening arrest they can be everywhere brought; but only if, from the nature of the thing, or by a peculiar privilege, they do not lie within the jurisdiction of a certain judge, to whom such cases are delegated to the exclusion of other judges, lest otherwise the *rationale* of adjudication and of jurisdiction should be too much disturbed, if, by arrest, a judge peculiarly appointed to that kind of business, were deprived of his jurisdiction, and if such cases could be determined by the authority of a judge from whom the hearing of the case was taken away by public law or privilege: *Bort van arresten, cap. 1. num. 16, 19, 20*. And although I have remarked above that, for the sake of preserving the thing, arrests are permitted even on account of a debt due on a future day, or conditionally; yet it would be absurd that an arrest should be granted for the sake of founding jurisdiction, while the day or condition was not yet arrived: for this kind of arrest is a citation in law, and he sins by making an over-demand who has dared to bring an action before the arrival of the day or the condition, and he will therefore be condemned in the costs of a lawsuit prematurely brought, and in other ways: § *si quis agens* 33. *Instit. de action.* (I. 4. 6); § *temporales* 10. *Instit. de exceptionib.* (I. 4. 13.): the consequence of which is that arrest is disapproved in such a case.

27. In what mode, however, we must proceed in arresting persons or things, and in what way permission to arrest is to be sought by petition from the provincial Courts, where a summary precedent cognition of the cause is necessary; how in the inferior tribunals every one can procure through the magistrate's officer an arrest of the movables, at his own risk and without any previous special order of the judge: how persons can only be arrested by the authority of the prætor, nay of the consul, if the citizen to be arrested, or a stranger suspected of flight, be of honourable dignity: how immovable things are to be arrested by the authority of the judge: how the plaintiff making the arrest ought to give security as to

expenses; especially where a person is to be arrested: in what way the confirmation of the arrest is to be immediately sought from the judge: in what space of time the question as to the validity or invalidity of the arrest is to be determined: moreover, in what way the persons or things detained are to be guarded: how the magistrate's officer is bound in damage and *id quod interest* when he refuses to arrest on the plaintiff's petition, or does not discharge his duty according to instructions: these, and matters of this sort, it is not necessary that I more fully explain; both because it is of everyday practice as regards the duties of magistrates' officers, and also because, in making arrests, the customs of tribunals vary as to manner, the consent of the judge, and other respects, and the custom of that place is to be observed where the arrest of person or things was made: *Peckius de jure sistendi cap. 11*: so that these things must be more accurately learnt by every one according to the custom of the Court in which he practises. See also *Mævius de arrestis cap. 16, 17, 22, 23*; *Bort, tractaat van arresten cap. 3. et cap. 6.*; *Simon van Leeuwen, cens. for. part. 2. lib. 1. cap. 23. num. 13 et seqq. et cap. 15. num. 40.*

28. This is clear, that no one can arrest his adversary or his goods, by private authority without a special or general mandate of the judge and the assistance of an officer representing the judge: since no one can lay down the law for himself, and a private person has no authority over a private person, nor should that be conceded to individuals to do which ought to be publicly done by a magistrate, lest the opportunity for a great tumult should then arise: *l. non est singulis 176, ff. de reg. Jur. (50. 16.)*; *l. qui jurisdictioni 10, ff. de jurisdict. (D. 21)*; *Peckius de jure sistendi cap. 19. num. 3. Consult. Juriscons. Holl. part. 2. consil. 151. incipit A. is uytegevaren num. 2. pag. 309.*; *Mævius de arrestis cap. 5.* Unless indeed there is a most immediate danger of flight or of the removal of the goods, and there is no way of getting the magistrate's officer or the judge: for instance, where a lodger has been for some time well fed in an inn should, packing up his things, by an unexpected departure wish to defraud the innkeeper of his debt; for then, as it is allowed at one's private discretion to apprehend a flying debtor together with his things, *l. ait prætor 10, § si debitorem 16, ff. quæ in fraud. credit. facta (D. 42. 8.)*, as we may also, on our private authority, retain other people's things carried on to our ground, and whereby damage is done to us, until the owner satisfies us or gives security: *l. ratis 8, ff. de incend. ruin. naufrag. (D. 47. 9.)*; *l. hoc amplius 9, § de his 1, ff. de damno infecti (D. 39. 2.)*: as, lastly, it is allowed by our laws nowadays, to detain another's flock depasturing on our ground, and to shut them in our stable, as is said in *tit. si quadrupes pauperiem (tit 9. 1.)*, so is it also that, lest the debtor should flee or the things be removed, it is allowed to retain them privately, as if, as it were, by the authority of an incompetent judge, until there can be a handing over to the officer of the law to be henceforward detained by public authority: *Christinaeus, vol. 2. decis. 168. num. 2. et*

id Leg. Mechliniens. tit. 3. art. 4; Peckius de jure sistendi cap. 2. num. 2., et cap. 3. num. 2. et cap. 19; Mynsingerus cent. 2. observat. 65; Berlichius part. 1. conclus. 73. num. 48.; Andr. Gayl. lib. 2. observat. 44; Petrus Bort, d. cap. 6. num. 1, 2, et cap. 3. num. 1, 2, 3.

29. He is the judge competent to decree the sequestration (deposit) of the goods, in whose territory the persons or things to be detained are found. In most matters this is physically self-evident, yet there is a doubt concerning returns (*reditus*) for which an estate is bound, and the day of the payment of which has arrived, and also as to the rents of houses and lands,—whether these can be arrested in the place of the debtor's domicile, or rather in the place of the situation of the thing for and in respect of which they are due; but as it is agreed that a debtor is bound by personal action for returns and rents and the like, I share the opinion of those who think that such debts can be rightly arrested in the place of the debtor's domicile, and that he can be interdicted by the authority of the judge of the domicile from paying the creditor until he has satisfied the party arresting: *vide Peckius de jure sistendi, cap. 9.*

30. But all judges are not clothed with the fullest power of ordering an arrest. For, in the first place, the Provincial Court, or other ordinary judges, although they exercise the power of arresting persons and things, yet cannot grant to the creditor of a state subject to another Princeps the liberty of arresting whatever subjects of that state he may find; because such a universal rescript is not of ordinary jurisdiction, but is reserved to the Princeps alone, who only grants such rescripts and arrests (which, by a special name, are called "*repressalie*") when it is perfectly evident that justice is denied to the subjects of his own territory by another Princeps where the suit had been instituted: *Neostadius Curia supremæ dec. 11; Mævius de arrestis, cap. 6. num. 50.*

31. In the same way, although both movables and immovables can be detained by the authority of district judges, for the purpose of preserving a thing, the daily practice of which is witnessed by *Petrus Bort in tract. van arresten, cap. 3. num. 13.* the debtors being suspected of flight, and thus the arrest being to preserve the thing; yet the right of arrest to found jurisdiction, whereby the inhabitants of the States of Holland would be compelled to litigate before the district judges by virtue of an arrest on person and goods, does not prevail in the districts: for that right is given to the Court, by law, in express cases, and the states can use the same right by way of privilege; to the district Courts, however, this right has not been conceded by the Princeps, so that such an arrest may be despised with impunity: *Neostadius Cur. suprem. dec. 83, and Simon Van Leeuwen cens. for. part 2. lib. 1. cap. 15. num. 21 et seqq.; also Papegaey van Van Alphen, part 1. cap. 24. van arresten, post med. pag. mihi 350; Bort van arresten, cap. 4. num. 39.* And although in many points of our modern law, the Hague is wont to use the same right as a Count as the other states of Holland do, as

with regard to the "prorogation" of jurisdiction denied in suits of lesser amount, and many other respects, yet in this particular it holds, as it were, a medium position between the towns and districts: since it enjoys the power of arresting the things of strangers for the purpose of founding jurisdiction, but not of detaining the persons of strangers: *privilegio Hagensibus date 20 Januar. 1561; Papegaey van Van Alphen, part 1. cap. 24. van arresten, d. cap. 3. num. 16.* But that any one may arrest a stranger, not a Hollander, or his goods, on the authority of a district judge, I do not find to be prohibited.

32. Nor, lastly, can those who, by any concession, have a tribunal in a foreign territory, and carry on judicial proceedings, rightly decree an arrest on persons and things taken in that territory where they have no presiding jurisdiction of their own, but where they only carry on judicial proceedings by agreement and at will: because a decree of arrest does not otherwise obtain effect than if the person or thing to be arrested is found in the territory which is mediately or immediately subject to him who decrees; and, beyond that territory, any one laying down the law may be disobeyed with impunity: *l. ult. ff. de jurisdict. (D. 2. 1.)* Hence neither a Brabantine, nor indeed any other peregrine, residing in Holland, can be arrested by a decree of the Brabantine Court,—which at the Hague exercises the Count's office towards litigants,—so that the suit between the detaining plaintiff and the defendant would be tried in the Brabantine Court. Nor can an inhabitant of Flanders, or any one else found in Zealand, on a decree of the Court of Flanders which lays down the law at Middleburg as to Flandric cases. And the same should by parity of reasoning be the rule concerning things found in Holland and Zealand, whether belonging to inhabitants of Flanders and Brabant or to strangers. But in all these cases the arrest should be made, and the suit conducted to its end, either by the order of the Court of Holland or of the urban judges, according to each one's jurisdiction: *Petrus Bort d. tract. van arresten, cap. 3. num. 3, 4, 5, 15; Papegaey van Van Alphen, part 1. cap. 24 on arrests, pag. mihi 348. in fine 349. huc faciunt quæ tradit Berlichius conclus. pract. part 1. concl. 74. num. 54, 57.*

33. They can arrest persons and things who have a legal right to appear in Court, and a power of citation in law and of instituting an action for themselves, or for others, *e.g.* tutors, curators, administrators: *Mærius de arrestis, cap. 7. num. 19 et seqq.* Whence, as it is not doubtful that an attorney who is clothed with a special mandate as to arresting Titius, can lawfully execute it, so also there is no doubt that any one having a mandate to cite Titius in law, can detain Titius or his goods for the purpose of founding jurisdiction; even if the mention of making arrests were not contained in the document of mandate: for when a mandate is interposed, those things also seem to be mandated without which the mandate cannot be executed: *l. ad rem mobilem 56, ff. de procurat. (D. 3. 3.):* and an attorney appointed to pray for a thing

can also bring an action for its production: *l. ad rem mobilem* 56, *ff. de procurator.* (D. 3. 3.); and, lastly, any one appointed to demand a legacy, cannot if he use against the heir the interdict as to producing the testament, be repelled by the *exceptio procuratoria*, i.e. that it had not been authorized him to ask this: *l. ad legatum* 62, *ff. de procurator.* (D. 3. 3.): he who uses an arrest for the purpose of commencing an action is not to be repelled; especially as the arrest itself is a real citation in law, and therefore is not the less, but equally, and even more fully included in the mandate as to citation in law, as actions preparatory in the principal mandates: *Petrus Peckius, de jure sistendi cap. 3. num. 4*; *Simon van Leeuwen, cens. for. part. 2. libr. 1. cap. 15. num. 6*; *Bort, van arresten cap. 2. num. 4, 5, 6*. But a general mandate for conducting matters to the advantage of the owner will not, it is more correct to say, so suffice, unless it be a general attorney constituted with a free administration, especially by him who will be very long or often away, and cannot give mandates for special causes, nor himself arrange or litigate or cite in law on account of his absence; and as it is a sufficient sort of mandate to make a citation in law, it ought also to be declared a sufficient mandate for arresting an adversary or his goods, as being a kind of citation in law, or certainly preliminary and preparatory to it; especially if the person to be arrested be not of such a condition that it is probable that the principal, if present, would abstain from the right of arresting. For that a general attorney, with free power, can do all those things which the principal himself would have done for his own benefit, *l. creditor* 60, § *ult. ff. mandati* (D. 17. 1.), I have said in the title on attorneys (tit. 3. 3.); and that these arrests are introduced on account of the sole utility to those who have recourse to them, appears from what has been already said: *Peckius d. cap. 3. num. 4*; whence it is that many, even those themselves who here require a special mandate, concede even to conjoint persons, without any mandate, the power of arresting and detaining, if only they give security that what they do will be ratified: even to partners in the same lawsuit on no other basis, as I think, than that it is allowed to act without mandate for conjoined persons: *l. sed et hæc* 35, *ff. de procuratoribus* (D. 3. 3.); *Carpzovius, de fin. forens. part. 1. constitut. 29. defin. 14 in fine*, joined to *part. 1. constit. 1. defin. 29.*; *Petrus Bort, tract. van arresten. cap. 2. num. 7, 8*. Nor is the opinion of Ulpian repugnant in *l. Pomponius* 40 *in pr. ff. de procuratoribus* (D. 3. 3.), for it is entirely an exceptional thing that an interdict as to the production of children cannot be laid by an attorney without a special mandate, so as to free the children when detained by another; because this real abduction was a special consequence of the paternal power, and therefore not to be conceded to another than the father: whereas even in that case a special mandate was not sufficient, but it was further required that the father was impeded by ill health or other just cause from bringing the action and taking away the children: *d. l. 40 in fine principii*.

Nor is it any the stronger, as some say, that a special mandate is required in executory cases, as also in those as a consequence of which any one can incur a penalty, or where there is an action as to a serious preliminary point; for all these apply to arrest: see *Carpzovius defin. forens. part 1. constit. 29. defin. 14*; *Berlichius, part 1. conclus. 74. num. 7 et seqq.*; *Mævius de arrestis, cap. 7. num. 22 et seqq.*; for an arrest does not contain a full execution, but only a certain beginning of execution, not to be continued farther than while the lawsuit lasts; nor does any serious injury arise out of arrest, nor injury to reputation; but by the rendering of the subject matter is interest, and by a discretionary punishment, the infamy, the result of an arrest obtained by calumny,—if, indeed, it can be called infamy,—is easily removed.

34. Those who have no legal capacity to appear in Court, such as minors and prodigals, unsupported by the authority of curators, also women subject by marriage to marital power, and not having the consent of their husbands: all these can without doubt be allowed here in Holland, in the absence of their curators or husbands, to arrest their debtors and their goods, for the purpose of beginning and finishing a suit, whenever there is danger in delay, and security be sufficiently given as to the ratification by the curator and the husband: see *Simon van Leeuwen, cens. for. d. part. 2. libr. 1. cap. 15. num. 5*: especially because in aid of commerce flourishing here as much as possible with strangers, arrests are not considered so odious, as already said: but in other places where this frequent recourse to commerce with strangers is not of so much force, and arrests are considered as very odious, and are looked upon as being matters of strict law, and a great anomaly on the common law and on the received general rules of equity, this opinion is not so easily admitted. Hence it is the practice received among the Ultrajectines that a married woman cannot arrest a debtor, not even where the danger of escape is urgent; and in a particular case in which a woman, prepared in the absence of her husband to give security did it, and the nullity of the arrest was alleged by the opposite party, after a full discussion the arrest was, I remember, only confirmed by one vote, and that not according to the common custom of that Court but for peculiar circumstances: the wife proving, by her ante-nuptial contract produced in Court, that all power of dealing with, and administering, the wife's property had been wholly denied to the husband, and reserved to the wife alone.

35. We have said "who can arrest, and who not:" it follows that we must now consider what persons and things can be arrested for the purpose of strengthening jurisdiction. And the first rule as to "persons" is: that all may be arrested who can be cited in law, for the purpose of trial by law, unless excepted by law or custom. And this whether males or females. For although it was laid down in *authen. hodie C. de custod. reorum* (C. 48. 3.), that women ought not to be imprisoned for civil debt, nowadays, however, this prærogative of woman has everywhere

receded from use, as, with many others, Groenewegen notes on the said *auth.*: *Mævius de arrestis cap. 8. num. 3 et seqq.* Nor does it matter whether they are to be arrested in their own name, or as heir, so that even an heir who has the benefit of inventory can be arrested: *Mævius d. cap. 8. num. 61 et seqq.* And this thus obtains provided the defendant to be arrested is apprehended in a place where this our law of arrest is not reprobated. For if it be not there admitted, a stranger cannot be otherwise rightly arrested for the sake of a suit, than if he had his domicile under such a judge who is wont to decree liberty of arrest against the subjects of another country not using this law. For which reason a Frisian may rightly arrest a Hollander, although otherwise this right of arrest would not be in use in Frisia: and this would take place by a sort of right of retort: *arg. tit. ff. quod quisque juris in alter. statuerit. (ante, tit. 2. 2.)*; *Sande decis. Frisic. libr. 1. tit. 17. defin. 3*; *Berlichius ad tit. ff. quod quisque juris in alter. stat., et ibi Hahnus in notis circa fin.*: concerning which right of retorsion we have more fully treated in *Tit. 2. (ante.)*.

36. There are some, however, who can in no way be arrested. They are some who are free from the fear of arrest in certain places, or in respect of certain persons. In no way can married women be arrested, minors, madmen, prodigals, and others, subject to the power of curators, and therefore not having the capacity to appear in Court: unless minors have obtained the "*venia ætatis*," in which case it has been before said that they can be cited in law, so that therefore nothing hinders their arrest for the purpose of completing a suit. Yet it is doubtful whether a married woman, who is a public merchant, cannot be arrested for a debt contracted by her as merchant. If her husband be present, it is more correct to say that not she but her husband must be summoned, and therefore must be arrested: for even he would have to suffer the execution for these causes, and if the obligation was one to do an act would himself be forced to its fulfilment by civil custody. Nor is this unreasonable, for he himself is bound by the act of his wife, as by his own wish and at all events tacit consent: the wife being as it were considered the agent of her husband, not only when she transacts business together with her husband, assisted by him as far as the labour is concerned, but also when she alone carries on business as a merchant, the husband not aiding her at all: for this reason, that in every case, whether the labour and industry of the husband concur, or are wanting, there yet always is the concurrent expressed or tacit mandate to him to contract; the marital power likewise remains; and she is in the power of her husband; even in respect of what she does as regards the exercise of business as merchant. Therefore where the husband dissents, a woman cannot be a public merchant, nor is she reckoned on by her own capacity but by that of her husband, so that she remains a minor, and, when injured, while carrying on trade as a merchant cannot be restituted. Nor should any one say that because a husband, by his consent, renders his wife fit

to contract, that thereby she should also be considered to have been made fit to litigate; for that the right to contract does not give the right to proceed in law, is clear from this argument, that, by the Roman law, minors who were without curators could indeed contract, but, until they had a curator, they had no legal capacity to appear in Court: *l. si curatorum* 3. *C. de in integr. restit. minor.* (C. 2. 22.); *junct. § item inviti* 2; *Inst. de curatoribus* (I. 1, 23.): and from this, that a woman rightly contracts as to that which belongs to her personal estate, and yet in respect of that, not she, but her husband, is summoned. Thus is it with a public merchantess whose husband is present; but when he is absent the needs of commerce advise that she can be rightly arrested and detained for the institution of a suit, when trading without her husband, beyond the place of her domicile; and it is for commercial reasons, as above said, that this right of arrest has been introduced: for unless those giving credit to such a woman knew that she could be arrested in that place in which she was found without her husband, for the purpose of recovering the debt, they would with more difficulty contract with her, as the husband, perchance, would never leave the place of his domicile: See *Rodenburch de jure conjugum tit. 3. cap. 1. num. 18, 19, 20; Brodeau sur les arrests de Louet tit. F. cap. 11.*

37. The same inquiry must be made as to tutors and curators, attorneys, testamentary executors, and other administrators of the things of others: for as these are not in truth debtors, nor act for themselves when they act in the affairs of others, and as often they are unwillingly compelled to take the trust, the result might be injurious: (for it would be injurious if they were detained in another place,—not being always able to find sufficient security in a strange place,—and if thus they were compelled to remain to the end of the suit); nor besides do they themselves suffer execution in person or goods, especially if they were condemned in a tutorial or other similar capacity: *l. si se* 4, *ff. de re judic.* (D. 42. 1.); *l. si tutor condemnavit* 2, *ff. de admin. et periculo tut.* (D. 26. 7.); *l. post mortem* 5, *ff. quando ex facto tut.* (D. 26. 9.). Therefore we may take it that they cannot be arrested for the debts of those whose things they take care of. Nor ought the favour given to commerce to be so great, nor the mere advantage of plaintiffs to be so much regarded, that those who are non-debtors should suffer hardly and inhumanly, for the exaction of the debt of another: even if perchance they themselves had contracted in this tutorial, curatorial, or procuratorial capacity: provided they have not bound themselves to the creditors who otherwise would have refused to give credit: *Bort van arrest. cap. 4. num. 46; Jac. Coren. observat. 3. num. 16 et seqq.; Peckius de jure sistendi, cap. 4. num. 13; Carpzovius defin. for. part. 1. constit. 32. defin. 14; Simon van Leeuwen cens. for. part. 2. libr. 1. cap. 15. num. 14; Ant. Fabr. Cod. libr. 5. tit. 23. defin. 5; Mævius de arrest. cap. 8. num. 24 et seqq. et num. 75 et seqq.*

38. On the same ground as the debtor of my debtor has not con-

tracted with me, and is not bound to me, he cannot be arrested by me : although that which he owes can be arrested by me in his possession : *Sande decis. Frisic. libr. 1. tit. 17. defin. 1 ; Peckius de jure sistendi, cap. 4. num. 11 ;* unless my debtor has ceded to me his debtor's debt, in which case he would be bound to me : *Berlichius, part. 1. conclus. 75. num. 13.*

39. On the ground of privilege, soldiers and military præfects cannot be arrested when they are going to camp, or to the presiding places assigned to them ; nor can those who carry grain, and the like, to the camp, and thus serve the public utility of the camp : *Peckius de jure sistendi cap. 5. num. 6, 7 ; Petrus Bort de arrestis cap. 4. num. 27, 28 ;* if however, soldiers do not go to camp, but are proved to wish to leave altogether the countries in which they earn stipends, and, for instance, to cross over hence into England or France, it has been decided that they can be rightly apprehended ; for then neither the favour of military discipline there, nor the defence of the republic from the calamities of war, any longer prevails with them, and therefore it is fair that they should be arrested as non-militants, lest they should go away and defraud the inhabitants of their debts : *Bort d. loco.* Neither, in like manner, can those be arrested, for the sake of the suit, who, on account of a privilege of Court conceded to them, can only be cited in law to a provincial Court ; such are councillors of the Court, and advocates and attorneys practising in it, in respect of civil cases ; the rector also and professors of the Leyden University ; and lastly, in many privileged cases ; so that the Court itself is wont, when thereto sought by the party arrested, to intercede by penal mandates, or by letters sent to the urban magistrates, whenever it happens that privileged persons are by them detained, or their goods, in any part of the province, for the purpose of strengthening jurisdiction. Clearly, if they have not their domicile at the Hague, but in other places in Holland, just as then they can be rightly sued in the place of their domicile, if not protected by privilege, there is nothing which forbids their being compelled also to litigate before any other inferior judge in Holland, by means of arrest of their persons or goods : *Simon van Leeuwen cens. for. part. 2. libr. 1. cap. 13. num. 6, 7. et cap. 15. num. 15 ; Consult. Ictor. Holl. part 2. consil. 143. pag. 279, 280 ; Sande decis. Frisic. libr. 1. tit. 1. defin. 1 ; Bort van arresten cap. 4. num. 5, 35, 36, 37 ;* where are also enumerated those who come under the appellation of "suppositors" of the Court : *Groenewegen ad rubric. Cod. ubi senatores vel clariss.* But if those who have been above referred to as living at the Hague, are arrested for debt, or their goods are arrested in the jurisdiction of another province, they are compelled to litigate there, being entitled to no privilege there, inasmuch as the privilege cannot operate beyond the territory of the conceding party, arg. l. ult. ff. de jurid. (D. 2. 1.) ; *Groenewegen ad l. 1. C. ubi senatores vel Clariss. (C. 3. 24.).* In a former century it was laid down, that those who, driven by the enemy, had retired into Holland, should not be detained by arrest in Holland, unless it was clear that

they possessed goods in Holland which could be arrested there, even if they had not entered Holland by way of flight: *placit. ordin. Holl.* 5. *Maji* 1584. *vol.* 2. *placit. pag.* 2161. Moreover, as anciently the honour was accorded to the higher Roman magistrates that they could not be cited in law during their magistracy, *l. in jus vocari* 2, *ff. h. t.* (2. 4.), so also is that honour now accorded to the dignity of the Counts of Holland, inasmuch as those who are delegated to the Assembly, whether in the name of the towns or of the equestrian order, cannot be arrested, for any cause, neither going nor returning, nor during the whole of the time in which they are engaged in the Assembly; both lest there should be delay in promoting the public utility, and also lest the office should be injurious to them, inasmuch as, if they had not been delegated to the Assembly, they could have remained away from those places: *placito ordin. Holland.* 4 Oct. 1588 and 23 July 1653; both of which *Bort* shews in his work on arrests, *cap.* 4. *num.* 5.

40. Again, no one is to be arrested in that place where he is called by the judge, by public authority, for the purpose of giving evidence or of accounting for a tutorship, since all tutors are bound to come to the same judge, lest the coherence of the cause be divided: *arg. l.* 2, § *legatis* 3, *ff. de judiciis* (D. 5. 1.); nor does the reason of justice allow that any one should be narrowed in his rights by the authority of the Princeps or the judge, as in a similar case the Emperor says in *l.* 1. *C. de his qui veniam ætat.* (C. 2. 45.). But if he came willingly, and not cited, for the purpose of vindicating the truth in a tribunal, or of carrying out a tutorship, since he cannot defend himself by any public authority, he in vain tries to avoid the bond of arrest: *vide Carpzovius defin. forens. part* 1. *constit.* 30. *defin.* 10; *Peckius de jure sistendi, cap.* 5. *num.* 11, 12; *Bort van arresten, d. cap.* 4. *num.* 29; *Berlichius, part* 1. *conclus.* 75. *num.* 28, 29. Where a debtor also is summoned by his creditor, for the purpose of trying to compromise as to a controverted matter between them, and a tutor is privately cited for the purpose of rendering accounts, although they can be arrested by anyone else—inasmuch as the private citation of one creditor cannot prejudice other creditors, being a “*res inter alios acta*,” according to the well-known rule—yet they cannot be rightly arrested in that place, or that journey, or that return, for the same debt or for another debt by the very creditor who has so summoned them; lest one who comes on the trust of the good faith and consent of his creditor shall be exposed to a fraudulent circumvention, not to be approved by any judicial authority, even if the compromise be not brought to an end by the headstrong obstinacy of the debtor; for it is of importance that the tacit pact contained in such citation, viz., of safe conduct, made between the caller and the called, should be observed: *arg. l. juris gentium* 7, § *ait prætor* 7. *unct. § dolo malo* 9, *ff. de pactis* (D. 2. 14.); *l.* 1, *ff. de constit. pecun.* (D. 13. 5.); *Christinæus ad Leg. Mechlin. tit.* 3. *ad rubricam num.* 4. *in addition. et ad artic.* 2. *num.* 4; *Peckius de jure sisten. cap.* 7; *Mævius de arrestis, cap.* 12. *num.* 23. There

is a doubt on this point, however, with *Bort on arrests*, cap. 4. num. 49. We would have to lay down a different rule, however, if the debtor had not been asked to come, but is shewn to have come voluntarily for the purpose of effecting the compromise, for then he is neither safe on the ground of a publicly nor privately interposed authority. On which ground it is also rightly contended that he who has come to any place for the purpose of marrying, or conducting a funeral, or for the cause of religion, can be rightly arrested in coming and departing, and at the place itself, provided he be not in the very act itself of marrying or conducting the funeral, lest the solemn act shall be disturbed: *Peckius de jure sist.* cap. 5. num. 12. Clearly if any one fear apprehension and yet desiring to compromise with his creditors, have obtained from the Princeps, or any one else having the power to lay down the law, a rescript of security (commonly called *sûreté de corps*) he cannot be arrested during the time mentioned in the rescript, whether it have been served on the creditors, or not, although some require there should be such service: *Bort van arresten*, cap. 4. num. 31. And the same is the case if he have obtained a "rescript of delay," in which case, as he cannot be summoned for debts anterior to the rescript, so neither can he be arrested: *Peckius de jure sistendi*, cap. 5. num. 17. et cap. 10. num. 9.

41. If any one travels beyond his domicile, in a strange place, either for the sake of appeal, or of carrying on another suit, whether as plaintiff or defendant, by the Roman law such an one could not be summoned in such place and during such time, for another suit; for the right was given him of declining such forum, and of recalling his home: *d. l. 2, § legatis 3, ff. de judiciis* (5. 1.). But we can scarcely allow this nowadays, whether he could carry on the suit by attorney, or whether he was himself bound to remain present: in which case he would not be excused from contumacy if he were prepared to satisfy on the condition only that he should not be detained by arrest, as it has been decided by the Court of Holland, according to *Bort, tract. van arresten*, cap. 4. num. 50. certainly with the highest reason; for not only does it make a great difference whether any one is called away by a necessary duty, even unwillingly imposed on him, as for the sake of giving testimony or accounting for a tutelage, or whether he has voluntarily bound himself by contract or delict, so that he is bound to make satisfaction to avoid the penalty of contumacy; it must be considered further that the judges of different places are now not so much under one supreme Princeps, who can impose on one judge the necessity of remitting such persons to the forum of the domicile; and even if they all had to obey one Princeps, yet he is so much the religious custodian of our patrimonial jurisdiction that these remits could with much difficulty find place. To which must be added that it is daily practice that a debtor arrested by one creditor in a certain place for the purpose of carrying on one suit, can be again arrested in the same place, during the pendency of that suit, on the petition of another creditor, which repetition of arrest

is also wont to be called in practice the "*commendatio*" or "*adhæsiô*" of the arrest; so that in that case the bond of arrest is not to be loosened unless all parties, both those arresting in the first instance, and "commending" in the second instance, are either legally secured or satisfied; nay, indeed, even if the first creditor had not lawfully arrested the debtor, yet that would not, with us, impede another creditor "commending," or anew arresting one illegally detained; whether the first arrestor had erred in the form and mode of arrest, or was without right of action and therefore of arrest: *Bort van arresten*, cap. 2. num. 10. *et many following sections*. For although it is the opinion of some that one who has been unlawfully arrested, or if lawfully arrested has had the arrest dissolved by public authority, after payment or security, cannot be "commended" by the same person nor by another, nor arrested anew, until he has returned home, or at least until such time has elapsed since his discharge that he could conveniently have departed from the place of arrest; yet it is more correct to say that he cannot be again arrested for another cause by the same creditor who rashly arrested, unless such a space of time had intervened between the dissolution and the new arrest that he could return home, or at all events go beyond the territory of the judge by whose authority he was detained; and that, lest his own groundless citation and arrest should benefit the arrestor. But there is nothing prevents one who is not yet discharged being "commended" by another creditor, nor his being re-arrested who had, rightly or wrongly, been arrested by another and again discharged: for if you take the case where the arrest has been lawful, the vigilance of one creditor ought not to take from others the liberty of guarding also for themselves, nor can what has been done between others injure me, or take away everyone's own right of citing in law and arresting. On the other hand, if you take the case where the first arrest has been calumnious, the calumny of one ought not to cause prejudice to others not parties to such calumny. In which way, too, according to the Roman law, creditors first put in possession did not hinder others also obtaining the like order, no distinction being made whether the first creditors had lawfully or calumniously obtained the decree of possession: *l. ult. C. de bonis auctor. jud. possid.* (C. 7. 72.); *l. cum unus 12, ff. de reb. aut. jud. possid.* (D. 42. 5.); *Peckius de jure sistendi cap. 49*; *Bort van arresten cap. 4. num. 48. adde consuetud. Antwerpæ tit. 27. art. 27, 28 et seqq.*; *Christineus ad Leg. Mechliniens. tit. 2. art. 40*; *Anton. Fabian. Cod. lib. 7. tit. 20. defin. 50*; *Henr. Kinschot de rescriptis gratiæ tractat. 5. cap. 3. in fine*.

42. As regards students, that they cannot be arrested is indeed generally laid down, as may be seen in *Berlichius part 1. conclus. 75. num. 20, 21, 22*; *Peckius de jure sistend. cap. 5. num. 1 et seqq.*; *Mævius de arrestis cap. 8. num. 95 et seqq.* But if you consider the customs of the present day, and especially our own, the detention of the furniture of the library is readily conceded for the purpose of conserving the thing itself, and also the detention of luggage belonging to students,

both for rent due and for the payment of other debts; nay, if necessity presses, the arrest of the students themselves is allowed, as the frequent practice in this (Leyden) University shews, whenever there is a danger of flight or departure, although, however, the power of arresting persons is granted with more difficulty than the power of arresting things. It is not doubtful also that the students of this University found in another province can be rightly arrested there for a lawsuit, and also for the purpose of strengthening jurisdiction; whether the proceeding is for debt or for a crime. For the privilege conceded by the Courts of this province to the members of our University cannot exceed their powers, nor can any statute operate beyond or without the territory of the statutors. But that in Holland they or their goods can be arrested by the authority of a non-academic judge, for the purpose of strengthening jurisdiction, so that they should be bound to litigate before the provincial Court or before the urban judges of the States of Holland, the clear words of *art. 39* of the Statutes of the Academy do not allow, and the ampliation made on the 24th of March, 1662, which lay down that students and other members of the University are bound to litigate in civil and criminal cases, whether as plaintiffs or defendants, nowhere else than before the Academic tribunal; whether the dispute was between students only, or between students and citizens; but a few cases being there excepted. These privileges could not, however, be preserved for them, if by an arrest of persons or things elsewhere made, they could be compelled to take up the lawsuit. And since this right of *forum* is so very peculiar to students themselves, that it did not belong to their children, nor their widows after their death, *d. ampliat.*, it would be in vain that anyone should wish to assert, on the ground of the privilege of students, that any right attaches to their parents visiting them, whereby, when they cannot be arrested in the place where they visit their children who are studying, unless they had contracted there, or promised to pay there, as *Peckius thinks, de jure sistendi cap. 5. num. 3; Berlichius part 1. conclus. 75. num. 10, 11*, whose opinion in any case rests on a foundation not received with us, that students cannot be arrested for their debts in the place where they stay for the purpose of study.

43. But most of all are legates of foreign nations, sent to other nations, safe from apprehension; for many contend that their persons are so inviolable by the law of nations, that neither in civil or criminal matters can they unwillingly submit to trial, whether for themselves, or those belonging to them, for even the legates of the *municipia* had, according to Roman law, the right of recalling their home, *l. 2. § legatis 3, ff. de judiciis* (D. 5. 1.). The consequence of which is that those who cannot be forced to litigate cannot either be forced to suffer arrest for the sake of a suit, for the purpose of preserving a thing, whether the arrest be of themselves or of their things; lest, while they altercate as to their private matters, they should more slowly or more negligently deal with the public matters they were sent to perform; and lest any

handle should be given for complaints that the rights and immunities of embassies were in any degree violated, because it often happens that complaints made by legates, according to their dispositions, of injuries very often feigned or arising in their minds unreasonably, by some later interpretation, are carried in a too angry spirit to their masters, and give a handle for jealousies, and disagreements, and wars between friendly and confederated peoples; for the violation of legates is, at all times and by all law, numbered amongst the just causes of making war, as I have more fully said in my treatise *de jure militari cap. 1. num. 25*. Something, however, can be argued from the ground of reason and by the law of nations concerning the question whether legates can or cannot be summoned on private contracts made during the time of their embassy: on which point see a long contention in *Bort tract. de arrestis cap. 4. num. 6 et multis seqq.*; where he both gives complaints of a legate himself and a full response of the provincial Court. Also see *Hugo Grotius de jure belli et pacis libr. 2. cap. 18 num. 4 et seqq.*; *Peckius de jure sistendi cap. 5. num. 9*; *Berlichius part 1. concl. 75. num. 26, 27*; *Wolfgangus Textor synopsi juris gentium cap. 14. num. 43 et seqq.*; *Mævius de arrestis cap. 8. num. 114 et seq.* By a certainly most prudent decree, for the sake of removing all doubt, and for preventing all handles for complaints, it was laid down by the Courts of federated Belgium, that legates, whether fulfilling the office of their legacy in Belgium, or passing through Belgium, and their followers and officers, should not be bound by the chain of arrest, nor should their goods be, on account of debts contracted during the embassy, but that they should safely go, stay, and return to their homes without any fear of apprehension. Nor can this seem a serious thing for the inhabitants of Belgium, for any one thus publicly warned ought to decide for himself whether he thinks credit should be given to legates not buying with ready money: *Placito Ordin. General. 9 Sept. 1679, vol. 3. placit. pag. 310*.

44. Whether what has been said concerning the legates of foreign nations ought also to be extended to those who are delegated in the name of single provinces to the federated assemblies of federated Belgium, as the States General, the Council of State, of financial matters, of maritime matters, is not yet fully decided that I know of; the delegates themselves claim indeed this right, but the Counts of Holland in fact opposing this immunity in court, as can be seen also in *Bort de arrestis cap. 4. num. 20 et seqq.* For although it cannot certainly be denied that they are sent by those clothed with authority in the provinces, in order that with other delegates of other provinces they may treat of those things which seem to affect the good of the confederated nations, and therefore seem to be not less privileged than those sent by the Roman *municipia*, whom I have said are clothed with the right of re-calling home, according to *d. l. 2, § 3, ff. de judiciis (D. 5. 1.)*, yet that in some respects they differ from the other legates of foreign nations is apparent from what has

been above said: *tit. de legibus num. 12. (D. 1. 3. ante)*. Add to this that that very decree promulgated as to non-arrest of legates and their followers, officers, and goods in the year 1679, as I have said, only refers, it will be found, to the persons of foreign legates, and by no means to the persons or goods of those about whom we are now speaking. Lastly, because the decree of the States General, made in the year 1653, 27 July, referred to by *Petrus Bort d. cap. 4. num. 22*, only claimed immunity for arrest for these delegates for debts anterior to their legation, whereas, on the other hand, the immunity conceded to the legates of foreign peoples was against apprehension for debts contracted during the time of embassy. But it is not for me to settle or rashly decide such points, wherefore I abstain.

45. It also obtains in many places that two inhabitants of the same province or territory cannot mutually arrest each other, or their goods, in another territory. Thus two Brabantines cannot mutually arrest each other beyond Brabant: *Peckius de jure sist. cap. 8*. Nor two Hollanders out of Holland: nor two Ultrajectines beyond the province of Ultrajectina. And that the inhabitants of any town shall not do this either, is laid down by various statutes of towns: these it is unnecessary all to name, but see *Simon van Leeuwen cens. forens. part. 2. libr. 1. cap. 15. num. 16 et seqq.*; *Mævius de arrestis, cap. 8. num. 77 et seqq.*; *P. Bort on arrests, cap. 4. num. 34, 39-44*, where he notes that the privileges of the Brabantines that they shall not be elsewhere arrested is of no force in Holland, Middleburg, Gotha, or Mechlin, and that they can be rightly arrested by the inhabitants of those places, according to the decree of Charles V. This *Christinaeus* also lays down: *ad Leg. Mechliniens. tit. 3. art. 7. num. 9 et seqq.* And if any one overlooking the disposition of the statute, arrests a fellow-citizen or his goods elsewhere, for the sake of beginning a lawsuit, the judges of that place will not err if they confirm the arrest, for they are not bound by the laws of another territory which forbid such arrest of fellow-citizens; but he who, thus detained, is forced to litigate, can rightly ask from his own judge to condemn his fellow-citizen to loosen the bond of arrest imposed upon him elsewhere contrary to the prohibition of the statute of the domicile, and renounce the suit elsewhere commenced, with costs, and pay the fine laid down by statute, viz., ten florins in Ultrajectina, fifty florins at Leyden: *Statutes of Leyden art. 184*; *Ultrajectina rubr. 19. art. 1*; *Paulus Voet de statutis sect. 8. cap. 2. num. 7*. It is the practice, however, in some towns to remit two strangers, not of different but of the same province, one of whom has arrested the other, to their ordinary judge, wherever the arrested party demands it. This, however, is more from reasons of comity than of necessity; or more for declining the too great frequency of lawsuits, which is troublesome to judges, and injurious to citizens who thus suffer the delay of their lawsuits: *Roseboom, costuymen van Amsterdam, cap. 19. art. 29*. But while some make such "remission" without being thereto obliged, it is agreed that others are

bound by mutual contracts to make such remission. Thus there is an agreement between the Counts of the Provinces of Holland and Ultrajectina that if a Hollander arrests a Hollander or his goods on Ultrajectine soil, or *vice versâ* if an Ultrajectine arrest an Ultrajectine or his goods in Holland territory, each shall be remitted to his proper judge, the bond of arrest being declared null; and if it be doubted whether each is a member of the same province, the trial and consideration of that point shall be with him in whose territory the arrest happened; and lastly, attendants and slaves are treated according to the law and the domicile of their masters and mistresses: *Agreement between the States of Holland and Utrecht* 22 Aug. 1657, and *placit. Ordin. Holl.* 10 Juli 1658. *vol. 2. placit. pag.* 1159. In the same way it is agreed between the Counts of Holland and Zealand, that a Zealander shall not arrest a Zealander in Holland, nor a Hollander a Hollander in Zealand, nor their goods; a similar dissolution of arrest, as being null, taking place: *farther provisional agreement between Holland and Zealand* 11 June, 1674, *art. 8. vol. 3. placit. pag.* 692. I may add to this that it has farther seemed necessary to decree that a Zealander shall not arrest a Hollander or his goods or ships in Zealand, or *vice versâ*, that a Hollander should detain a Zealander in Holland by arrest: unless any one follows up goods sold by him on account of a price not paid, or apprehends his adversary in the very place where the contract was celebrated: in which case you can force him to take up the lawsuit there, all right of arrest then ceasing: *d. farther provisional agreement, art.* 5, 6. In almost the same way it is agreed that the inhabitants of the town of Slusana in Flanders shall not apprehend those who have their domicile in the adjacent territory (called *the Free*); and *vice versâ* that the Slusani shall not be arrested in such territory. Which agreement of the States General has been confirmed by decree of 30 April, 1660, *vol. 2. placit. p.* 2619.

46. These conventions do not, however, impede a Hollander arresting a Hollander, or his goods, in Ultrajectina, whenever he is in flight, or seriously suspected of flight. And the same should be said concerning others: but for no other reason than that the arrested person shall be safely remitted to his own competent judge for the purpose of taking up the suit: it was thus nominately laid down in the said *agreement between the States of Holland and Utrecht, art. 3 and 4; Peckius de jure sistendi cap. 8. num. 7.* Add what I have said in the preceding title, 45. But there is nothing on the ground of these provincial conventions which prevents a Hollander ceding to an Ultrajectine an action competent to him against a Hollander, so that the Ultrajectine for the purpose of carrying on the action ceded to him, can there arrest the Hollander-debtor or his goods. For as this cannot be found to be expressly prohibited, we must hold to the disposition of the common law received in practice: *Confer Mævius de arrestis, cap. 7. num. 7-10.*

47. Whether parents can be arrested by their children, I think is

clear from what has been said as to the verbal citation in law of parents, viz., that without permission obtained they cannot be arrested for the sake of commencing a lawsuit: but that they can, when such permission is obtained, nor will it be easily refused, generally. That this permission was anciently obtained because, partly, there was then a custom of violently dragging into Court, partly because of motives of reverence which did not admit a defaming action, has been already before shewn. As therefore of old, when the liberty of summoning parents was granted, it was free to children to drag their parents, even unwillingly, into law, therefore there is no reason why it should not be allowed them nowadays to apprehend them for the sake of a lawsuit, by special consent of the judge: our arrest being the nearest approach to that ancient real citation in law, except that the former has the authority of the judge conjoined to it, whereas the latter happened by private authority: *Rodenburch de jure conjugum, tit. 3. cap. 1. num. 22*; *D. Somenen de jure novercar. cap. 15. num. 2.*; (*P. Bort on arrests, cap. 4. num. 2. dissents*); *Berlichius, part. 1. concl. 74. num. 10 et seqq.* It is vain that it is excepted that this kind of citation is an offending against reverence and doing an injury to the parent: for reverence is sufficiently satisfied where there is no citation without the prætor's permission, nor can he be said to do an injury who uses his own right, and pursues his debt in the ways approved by law and custom: as *Carpzovius* says: *defin. forens. part. 1. const. 29. defin. 28.* Nor does it affect the point that a child is rightly disinherited if he were unwilling to release his father, when imprisoned by another, on his own fidejussion, *nov. 115. cap. aliud quoque 3, § si quemlibet 8*, and that therefore he would much rather seem to fall into the vice of ingratitude if he himself were to arrest and to imprison: for it is one thing to imprison a parent in gaol, and another to arrest him for the sake of a suit: and therefore nothing else would follow therefrom than that where others already apprehended could be imprisoned to the end of the suit if they did not give sufficient security as to remaining, such imprisonment would not be exercised towards parents, but they would at once be discharged when the jurisdiction was made firm, although perchance they had not interposed full or sufficient security as to remaining. Which also anciently obtained in real citation in law, for whereas those summoned in law had either to go, or to give suitable security as to remaining, the honour was shewn to parents and other conjoined persons that they could be discharged by any kind of surety, even if not rich: *l. 1. 2. et tot. tit. ff. in jus vocat. ut eant aut satis vel cautum dent* (*D. 2. 6.*), although this cannot be safely admitted nowadays in regard to parents, after it became the practice in many places that those arrested had always to give security for the satisfaction of the judgment: in which security this privilege is nowhere found given to parents, as I have noted in *tit. qui satisd. cog.* (*D. 2. 8. post.*). Nor need I say that the words in *d. nov. 115. c. 3, § 8*, ought to be taken *civiliter* as referring to those children whose ill feeling mani-

festly appears in not liberating their father by their suretyship when they could easily do it: for although children do owe aliment to their parents, they are in nowise bound to pay their debts for them: *l. si quis a liberis* 5, § *parens quamvis* 16, ff. *de agnosc. et alendis liberis* (D. 25. 3.): *tit. Cod. ne filius pro patre* (C. 4. 13); whence this cause of disinheritance does not appertain to daughters: *d. novell.* 115. cap. 3, § 8. Much less does the reason apply taken from the "*beneficium competentie*" granted to parents, according to § *ante pen. Instit. de actionibus* (I. 4. 6.). For that is a wrong opinion of very many, that those parents cannot be arrested who are armed with the "benefit of competence:" for although these cannot be imprisoned for debt, just as if they had exercised the benefit of cession, arg. *l. 1. C. qui bon. ced. poss.* (C. 7. 71.), joined to § *ult. Instit. de action.* (I. 4. 6.), yet the conclusion drawn from cessation of imprisonment to the cessation of simple arrest is not a correct one: for arrest only happens that there may be a litigation as to the debt, that it may be known and discussed what ought to go to the creditor and what remain with the debtor, that he may not want, and thus that he should give all that which by the *beneficium competentie* he could not retain for himself: *Peckius de jure sistendi*, cap. 5. num. 18; *Mævius de arrestis* cap. 8. num. 173 et seqq.

48. You will in vain dispute the right of arrest as to a step-mother, a brother, and the like, because no *beneficium competentie* is at all granted to them, as is fully proved by *D. Someren de jure novercar.* cap. 15. num. 2 et 3; so also is the privilege of non-arrest extended without any foundation to nobles, illustrious persons, counts, commentators, for with these, just because they are better born, more illustrious, more learned, good faith requires that therefore the more should they faithfully fulfil their contracts, and not be compelled thereto by easier or less stringent remedies than plebians are, if they would respect the splendour of their birth, and their true nobility, gained by their merits, and not contaminate it by denying or delaying the fulfilment of their pledged faith: *Mævius de arrestis* cap. 8. num. 13 et seqq., the contrary opinion being in vain, which is held by *Berlichius part 1. conclus.* 75. num. 15. et seqq. ad num. 20.

49. This is worthy of consideration; that a debtor cannot be arrested, for the sake of strengthening jurisdiction, in that place in which the suit has already been commenced against him, by means of an arrest of his goods; for since the plaintiff, by the arrest of the goods, has already made the defendant subject to that *forum*, so that the suit commenced there must be necessarily continued to its end, and the defendant could not for any reason, validly further decline that *forum*; the arrest of the debtor would be useless and superfluous for an aim already attained in another way. Besides which it does not behove, without there is a suspicion of flight (as to which *ante*) to do anything new during a lawsuit, or to attempt a fuller execution before sentence, without necessity: arg. *l. unic. per tot. ff. nihil. innov. appell. interposita* (D. 49. 7.);

Argentæus ad consuet. Britann. art. 122. Yet when an arrest is decreed, and the lawsuit thus commenced with the principal debtor, the creditor is not hindered from arresting the surety, and beginning a lawsuit with him, leaving the principal, and *vice versâ*: *Mævius de arrestis cap. 8. num. 40.*

50. Having finished the question as to personal arrest, it will be more easy and ready to deal with arrest on things. It is clear, with regard to those debtors, whom we have already explained could be arrested, that their goods can be much more bound by the chain of arrest, because the apprehension of things is more easily granted than that of persons, unless the things themselves contain within themselves a privilege on account of which it is forbidden to arrest them. And although many of those whom I have above warned you cannot be arrested, are of that condition that neither can their goods be rightly arrested, and thus neither the things of legates, tutors, curators, procurators, administrators, nor goods for the debts of those who take care of them; nor the goods of a Hollander by a Hollander in Zealand, and *vice versâ*, nor the goods of those whom they call "substitutes of the Court" (*curiæ suppositos*), yet in regard to some of those above-mentioned, it obtains otherwise. And thus the debtor of a debtor cannot be rightly arrested, though his debt can generally be arrested, as has been before observed: *Mævius de arrestis cap. 9. num. 34 et seqq.*; *Bort van arresten cap. 5. num. 9 et seqq.*; *Peckius de jure sist. cap. 4. num. 11*; *Sande decis. Fris. libr. 1. tit. 17. defin. 1*; *Lamb. Gor. Adversar. tract. 4, § 20. et in annot.*; *Rebuffus ad constit. regias tom. 1. de literar. oblig. art. 6. gloss. 3. num. 63, 64*; nor unconditional debts only, but also due at a particular day, in as far as when the day arrives, the debt is not rightly paid against the interdict: *Radeluntius Cur. Ultraject. decis. 18. num. 1*; although otherwise the laws dictate that that which is due to another cannot be demanded by a third person without his consent: *l. si pupilli 6, § ult. l. solvendo, 39, ff. de negot. gestis. (D. 3. 5.)*. So also the goods of pupils, minors, madmen, and the like can be rightly arrested, so that the tutors and curators on whom it is incumbent to undertake the defence of pupillary things, can be forced to litigate in that place in which such goods are detained by arrest: *Bort van arresten cap. 4. num. 47*; *Mævius de arrestis cap. 8. num. 6 et seqq.*; *Simon van Leeuwen cens. forens. part 2. libr. 1. cap. 15. num. 14. in fine.*

51. Although moreover, annual rents, and interest, and payments can be arrested, *Carpzovius de fin. for. part 1. const. 29. def. 29*, and with us also, feudal goods, whether the suit were raised as to feudal controversies, or as to other things; so that in the latter case even an ordinary judge to whom otherwise jurisdiction as to feudal matters was denied, can legally interpose a decree of arrest as on feudal things: *instructio Curiæ Feudal. Holland. 7 April, 1661, art. 8. vol. 2. placit. Holl. pag. 2648*; yet, by a special law, framed for avoiding the disturbance of public accounts, it has been forbidden that interest and annual rents already

due, and belonging to our debtor, should be burdened with arrest in the hands of the quæstors of the treasury, and much less the capital itself; so that the quæstors are forbidden to obey an arrest: *placit. Ordin. Holl.* 18 Martii 1661, vol. 2. pag. 2639. For almost the same reason the privilege is accorded to the Bank of Exchange at Amsterdam, that no arrest shall be laid on what is deposited with it for the sake of custody, whether directly or indirectly, and therefore, not even under agents to whose accounts others money have been transferred for the sake of custody: *Placitum Ordin. Holl.*, in favour of the Amsterdammers, 16 Dec. 1670, which is given by *P. Bort on arrests*, cap. 5. num. 30. The favour of aliment also seems to have brought about that when due to any one in the future it cannot be burdened with arrest; for no one should be rashly deprived of his daily aliment, and thus killed, according to *l. necare 4, ff. de agnosc. et alen. liberis* (D. 25. 3.), where it is not, however, clear that it was the case of a debtor of him who desires to make sequestration, arg. *l. qui bonis 6, ff. de cess. bonor.* (42. 3.), for from the goods of undefended pupils possessed by the authority of the judge are to be separated, for the pupils, their aliment up to the time of puberty; because it is uncertain as to those who are undefended and are not able to defend themselves on account of their age, whether they are really debtors, or are only wickedly alleged to be so: *l. si pupillus 83. l. ult. ff. de rebus auctit. jud. poss.* (D. 42. 5.); such "puttings in possession" are not very dissimilar to our arrests. And although appeal suspends execution, yet from a decree as to furnishing aliment it is not allowed to appeal, at least not to the end that execution may be postponed: arg. *l. ult. ff. de appell. recip. vel non* (D. 49. 5.). In addition to which, the last will of the dying would thus be subverted, where, in legating aliment to a certain person, they were unwilling that that aliment should be otherwise directed; this was also the reason why the laws forbid that there should be a compromise as to aliment without a decree, nor did they allow a decree to be interposed unless the wish of the deceased remained uninfriuged on: *l. cum hi 8. pr. et §§ seqq. ff. de transaction.* (D. 2. 15.); *Berlichius part 1. conclus. 74. num. 43*; *Carpzovius defin. forens. part 1. constit. 29. defin. 33.* But if aliment is due in the past, inasmuch as they lose the name, nature, and privilege of aliment, and inasmuch as no one is to be supported in the past, nothing prevents the arrest of such aliment, on the analogy of simple annual allowances or payments; for that these can be compromised without decree is stated in my *tit. de transact. (post 2. 15.)*,

52. In the same way there cannot be sequestrated in federated Belgium the stipends or wages of sailors and partners of sailors, except for a debt contracted for clothes, or food, or house-rent during their voyage, and for thus, as it were, paid aliment, as if, according to *l. legatis 6, ff. de aliment. vel cibariis leg.* (D. 3. 41.), containing food, clothes and dwelling: *Placito Ordin. General et Ordinum Hollandiæ*, 8 Dec. 1653. Vol. 1, *placit pag. 966.* It is more correct to say that other stipends and

salaries due to professors, ministers of the Gospel, advocates, doctors, and others, can be arrested, not only for the purpose of instituting a suit, but for conserving the thing. But whether these can be wholly arrested, or only as to part, and for what part, that is a question which must be inquired into according to the varying customs of every region, and decided according to the manner of each place, and therefore is left to the discretion of the careful and circumspect judge. See *l. stipendia* 4. *Cod. de cept. rei judicate* (C. 44. 2.); *Peckius de jure sistendi* cap. 5. num. 12; *Simon van Leeuwen cens. for. part 2. libr. 1. cap. 15. num. 29*. So in the regions which are immediately subject to the States-General, the stipends of members of the assembly cannot be arrested except up to the half: *Reglement op de politieke reformatie in de Meyeree van's Hertogenbosch en andere quartieren*, 1 April 1660, art. 38. vol. 2. *placit. pag.* 2614.

53. With regard to things belonging to an estate, although it was laid down by the Roman law that no one was allowed, before the ninth day from the death, to summon or in any way disturb the heirs, or parents, or children, or spouse, or agnates or cognates of the deceased, *novell.* 115. *cap. hæc autem* 5, § 1, yet if there be a fear that the inheritance will be robbed, the goods of a debtor can be arrested by his creditors even before the ninth day, and before the burial of the deceased, immediately, even, on the death of the debtor: *Groenewegen ad auth. item C. de sepulchro violato* (C. 9. 19.); *Christinaeus*, vol. 1. *decis.* 81; *Zypæus notit. Jur. Belgici libr. 1. tit. de in jus vocat. circa fin.* But it is wholly forbidden that the corpse of the debtor shall be arrested for debt, and his sepulture impeded, and this under threat of a very heavy penalty: all obligations of pledge or fidejussion, or payments of money extorted in that manner being declared void: *l. ult. C. de sepulchro violato* (C. 9. 19.) *d. novell.* 115. *cap. 5*, § 1: for the remembrance of our human condition demands that the remains of deceased persons shall be buried, as *Modestinus* says in *l. pen. §§ conditione Instit.* (D. 28. 7.): and so, on the contrary, to deny the last honours and repose to dead persons has always seemed too cruel and unjust, except in the case of the gravest criminal-offenders: *d. ll.*; as to which matter *Peckius* has gathered together much in his *de jure sistendi* cap. 5. num. 23 *et seqq.*; *Groenewegen ad l. auth. idem C. de sepulchro violato*; and that it was laid down by *Charles V.* that burial should not be impeded on account of civil debt, is testified by *Peresius tit. Cod. de sepulchro violato*, num. 7, 8, 9, who warns us, however, that in various places, contrary to this law so supported by the favour and highest reason of humanity and religion, the unburied corpses of debtors are vexatiously arrested, until payment is made. Add *Mævius de arrestis* cap. 8. num. 225 *et seqq.* But what obtains as to the corpses of those who, not from the consciousness of crime, have committed suicide, I shall say in my *title ad leg. Cornel. de sicariis* (post, tit. 488).

54. As to things belonging to others, possessed by a debtor, and

whether they can be arrested by a creditor for the sake of instituting a suit against the possessing debtor: this is a question which cannot be settled without having recourse to some distinctions. For if it be so entirely another's property that the possessor has no right in it, nor the right of detaining it without the owner's consent, as if it be a stolen thing or a thing possessed in violence, I think the detention would be vain and useless, whether it be had recourse to for the sake of conserving the thing, or for the sake of a suit: for this reason, that if the owner claimed it, the restoration of possession could not be impeded, lest one person should be oppressed by the hatred of another, against the rule *non debet* 22. *de reg. juris* in 6 (D. 50. 17.): and therefore that which has been raised as a superstructure on the detention of another's things, as its foundation, can be at any moment declared void, arg. *l. bona fides* 31, § 1, *ff. depositi* (D. 16. 3.), and as the pledge of others things cannot subsist without the wish of the owner, *l. aliena res*. 20, *ff. de pignorat. act.* (D. 13. 7.), and as by a decreed "putting in possession" of the goods of a deceased person possession of neither the things deposited with, or commodated to, the deceased can be regarded as conceded, because they were not the things of the deceased: *l. is cui* 5, § *si deposita* 10, *ff. ut in possess. legat. vel fideic. serv. causa* (D. 36. 4.): and as, lastly, execution would be rashly directed by the apparitor or executing officer against things belonging to others, or things as to which he doubted whether they belonged to others: *l. a Divo Pio* 15, § *si rerum* 4, *ff. de re judic.* (D. 42. 1.),—so neither can they be arrested for another's debt; for that there can be a beginning to execution in this way is manifest from what has been before said. As, however, where there is a doubt, it must be presumed from possession that he who possesses is owner, until the contrary is proved: *Peckius de jure sistendi cap.* 16. *num illud vero indubitatum* 5, 6; *Berlichius part 1. conclus.* 74. *num.* 46; *Præs. Everhardus consil.* 209; *Rebuffus ad constit. reg. tom. 1. de literar. oblig. art.* 6. *gloss.* 3. *num.* 52 & 54; *Petrus Bort de arrestis, cap.* 5. *num.* 31; *Mævius de arrestis, cap.* 9. *num.* 2 *et seqq. et num.* 16; *Simon van Leeuwen cens. forens. part 2. libr. 1. cap.* 15. *num.* 32. But if the debtor has obtained a right over such property of another as a right of pledge, or the like, the creditor will rightly arrest such thing pledged by another to his debtor: because it will seem to have been burdened with arrest, not as another's property, but rather as a right competent to the debtor over another's property, and thus as something which belonged to the debtor: in the same way that it is known there can be a pledge of a pledge according to *tit. C. si pign. pignor. dat. sit* (C. 8. 24.), and legatees and creditors "put in possession" of the goods of the deceased or of a debtor, obtained possession also of the pledges given to these: *l. is cui* 5, § *sed et si* 7, *ff. ut in poss. legat.* (D. 3. 4.); *Rebuffus d. art.* 6. *gloss.* 3. *num.* 53.

55. Hence it can neither be open to doubt but that a creditor about to proceed may arrest a thing common to his debtor with another, the part

individual ownership of which, at all events, belongs to the debtor : so much so that not even on that ground is there any impediment to the arrest that perhaps the thing held in common is in its nature indivisible ; for in that case the whole thing may seem to be burdened with arrest : arg. *l. is cui* 5, § *si ex duobus* 11, *ff. ut in possessione legator. vel fideic. serv. causâ* (D. 36. 4.) : and each owner of a common thing can, by the action based on partnership (*pro socio*) or for partition (*communi dividundo*), recover from his partner whose delay gave occasion for the arrest, as much as he lost by being without the use of his share : *Rebuffus ad constit. reg. tom. 1. de literar. oblig. art. 6. gloss. 3. num. 53. Peckius de jure sistendi, cap. 4. num. 18 ; Mævius de arrestis, cap. 9. num. 4.* If, however, a share in a ship, of which there are many captain-owners (*exercitores*), be burdened with arrest, its navigation will not on that account be impeded, or at least the other captain-owners will be able to obtain a dissolution of the arrest, so that the whole ship may go on its voyage, on the condition that on that part of the ship, wherever it be, and on the gains thence arising, the claim of arrest will remain, and the ship-master must give security that he will, in the name and at the risk of the arresting parties, protect that part everywhere, as burdened with the arrest : *vide Peckius de jure sistendi cap. 16. num. ult.*

56. In the same way, although a debtor who gives his goods in pledge to another, is considered to have lessened the right of ownership, yet as he has not wholly ceased to be owner, it is free to the creditor to arrest such goods with the creditor who possesses it by right of pledge, whether for the purpose of forcing his debtor to take up the suit in that place where the thing is situated, or for the purpose of conserving the debt : preserving, however, to the hypothecary creditor his right of preference on the price realized from such arrested thing in the same way that chirographic creditors obtained " putting in possession " of the goods of their burdened and hiding debtor, although bound to other creditors by right of conventional pledge : or in which creditors who are successful in a suit had execution over the goods of the losing party bound to another by hypothec, the prior creditors in both cases retaining their undiminished prerogative by right of pledge : *l. a divo Pio* 15, § *quod si res* 5, *ff. de re judicata* (D. 42. 1.) ; *Peckius de jure sistendi cap. 16. num. ult.*

57. On the other hand no one rightly detains his own thing in arrest, unless for the purpose of vindicating it from an unlawful possessor : in which case, as above stated, he can claim the right of arrest even in real actions. If, however, a third party has a right to my goods, whether possessed by me or by another, as for instance a right of hypothec or pledge, or the like, and he becomes my debtor from another cause, there is nothing forbids my arresting my own goods when with me, by authority of the judge, not in as far as it is mine, but in as far as a right is constituted over it as of a third party ; for this purpose that it becomes subject to the jurisdiction of my ordinary judge by virtue of

arrest. It is the same if my creditor, to whom, for example, I owe 100, owes me other things not admitting of compensation: for then also I can rightly arrest with myself what I so owe, that I may draw to my forum the same debtor to me, from another cause: *Petrus Bort van arresten*, cap. 2. num. ult.; *Simon van Leeuwen cens. forens. part. 2. libr. 1. cap. 15. num. 33.*

58. It must not be omitted to be stated, however, that even if the goods are such as it is not prohibited to arrest, all liberty of arrest is nevertheless denied to creditors from and after the appointment of a curator to the goods of the hiding or the deceased debtor: so that not even is the execution commenced before the appointment of the curator to be conducted to an end, but all are bound to come to the same judge to contest as to their right preference together with the other creditors of the same debtor: and this is in accordance with the Roman law by which, when certain creditors were "put in possession," the other creditors, also, who did not pray to be put in possession, appeared to be put in possession, as if by a decree of putting in possession framed *in rem*; or at all events they pray that they may be admitted together with those first put in possession: *l. cum unus* 12, ff. *de rebus auct. jud. possid.* (D. 42. 5.) and before the putting in possession every one can be vigilant for himself: but after it not. "For it must be known," said Ulpian with Julian, "that this is our law that he who received the money due before the goods of his debtor were possessed, although he recovered it knowing and being aware that it should not be paid, need not fear this edict: for he was vigilant in his own behalf. He who, however, received his debt after the goods of the debtor were possessed, is to be cited for this portion and to be equalized with the other creditors, for he ought not to snatch away from the other creditors after the goods were possessed, for then the condition of all the creditors had been made equal:" *l. quod autem* 6, § *sciendum* 7, ff. *quæ in fraud. cred. facta sunt ut restit.* (D. 42. 8.); and *P. Bort de arrestis*, cap. 4. num. 64; *Anton. Fabrum Cod. libr. 7. tit. 32. defin. 18, 19, 20*; *Mævius de arr. cap. 8. num. 148 et seqq.*

59. Whoever wishes to assert, for himself or his goods, immunity from the burden of arrest, is bound to allege and prove it immediately before the contesting of the suit: for if that is the practice as to exceptions declinatory of the forum, *l. pen. et ult. C. de exceptionibus* (C. 8. 36.), it necessary that the same rule should be followed here: since by such an allegation of immunity it is clear that the forum and jurisdiction of the judge with whom the arrest is made are declined: *Peckius de jure sistendi cap. 14. num. 1.*: nor should this immunity of arrest in respect of persons and goods be only alleged before him by whose authority the arrest is interposed, but also, if need be, if he does not allow the allegation of immunity, complaints of violated immunity can be preferred to that judge to whose jurisdiction the cognition of the cause is made subject by the arrest, and his help and aid can be implored: lest the privileges of

those who are subject to him should be overturned by others, and allowed to be trodden under foot.

60. The effect of a rightly interposed arrest is that during the time it is of force there can be no innovation as to that which is arrested. And therefore persons so arrested cannot with impunity move away from the place in which they are arrested: if those who are detained for a civil debt do so without the consent of the judge or the creditor, they do not only incur the penalties of gaol-breaking, but can be either summoned, within a year from the time of the violated arrest, for the penalties fixed by statute, or can be punished at the discretion of the judge according to the various circumstances of the violated arrest: and moreover can be proceeded against as contumacious: of this all, see at full length *P. Bort van arresten*, cap. 7. num. 30 et seqq. usque ad num. 42; *Mævius de arrestis*, cap. 24; *Simon van Leeuwen cens. forens. part. 2. libr. 1. cap. 15. num. ult.*; *P. Peckius de jure sistendi* cap. 28. And if there is one prætor for civil arrests, and another for criminal arrests, and a person arrested for a civil debt has violated his arrest, he ought to pay to the prætor the penalty as of a civil, and not a criminal, arrest, the payment being as it were to him by whose authority the arrest was made: this is so laid down in the *Dutch consultations part. 3. vol. 2. consil. 319. revera 219. in fine*. He who can be proved to have by fraud, or advice, assisted the flight and escape of the arrested person, or to have released him, thereby makes himself bound to pay the whole debt for the recovery of which the debtor was detained: for thus it obtained according to the law of Constantine that he who allowed the debtor to be rescued or taken away was bound to take upon himself the payment of the whole debt: *l. quotiens 3. C. de exactorib. tribut.*: and even anciently, according to the edict of the prætor, if anyone released another by force who had been cited in law, he was wont to be condemned in the "*id quod interest*" of the thing to be litigated about: *l. pen. § 1. junct. l. sed eximendi 4, ff. ne quis eum qui in jus voc. vi eximat* (D. 2. 7.); so much so that if the arrested person return after his escape, and submit himself to the same tribunal, he will indeed escape the penalty of ordinary escapers, and not be bound to pay the whole debt, *d. l. pen. § docere 2, ff. ne quis eum qui in jus voc. vi eximat* (D. 27.) (although even as to this some writers are of a contrary opinion), but will nevertheless remain bound in "*id quod interest*" the plaintiff by reason of having made his case, and the prosecution of it, in a measure slower and more difficult; for the judge should so act in all ways that the case does not become worse by another's deeds: *l. 1, ff. de alien. jud. mutand. causâ* (D. 4. 7.); *Peckius de jure sistendi*, cap. 33; *Christinæus ad leg. Mcchliniens. tit. 3. art. 3. num. 4. et seqq. et art. 5. n. 4*; and much more is this to be laid down as to a magistrate's officer (apparitor) or gaoler (*commentariensis, lit.* one who makes out a list of prisoners) who fraudulently or negligently gives cause for the flight: as is more fully laid down in the *tit. de custod. et exhib. reorum* (*tit. 48. 3. post*).

61. If it be things which have been burdened with arrest, then as to immovables they cannot be alienated, during the arrest, by the owner in prejudice of the arrestor: since the judge will not grant his authority for their arrest unless it be made according to the law of the situation. As to movables their possession cannot legally be transferred to another, nor can it be in any way diverted by him with whom they are deposited: so much so that if he in fact transferred it, destroyed it, or ceased to possess, he is not only bound to pay a fine, which the officer making the arrest is warned, in case of diversion, must be exacted within the year according to the custom of the tribunal: *Neostadius curiae suprem. decia. 79*, where he also says to whom the fine goes: *Bort van arresten, cap. 7. num. 32, 33. Vid. Peckius de jure sistendi cap. 29 & 30*: but he is also bound to restore the diverted possession, and to restore the thing to its pristine condition, or, if he cannot do that, then the "*id quod interest*" of him who caused the arrest to be made, and also of the debtor himself, if he also shews himself to be injured by such diversion: provided, however, the fraud or the manifest negligence of the possessor appear: *groot privilegie van Vrouwe Maria van Burgundie aen die van Holland & Zeeland 14 Martii 1476. post med. vol. 2. placit. pag. 669 in med.; Peckius de jure sistendi, cap. 44; Christinæus ad Leg. Mechliniens. tit. 3. art. 5; P. Bort d. cap. 7. num. 35 & 36*. That, however, movables thus diverted, and transferred to another by the will of the owner, pass over by right of ownership, is not doubtful, since movables have nowadays no following up. If such things are arrested which cannot be preserved by keeping, they may be sold by the authority of the judge, and it will suffice if the price which has been realized in lieu of them be kept: *P. Bort van arresten, cap. 5. num. ult. et cap. 7. num. 6*.

63. As to debts arrested with the debtor of a debtor, the force of arrest is this, that the debtor cannot pay that which is arrested; and if he in any way pay without the wish of the arrestor he cannot at all prejudice the arrestor by such payment, but is afterwards bound to pay the arrestor, if successful, just as if he had paid nothing to his debtor, or to another, at the will of the debtor. Nor will he be excused if he be caused to pay his creditor by fear of a suit: for it was not in the power of the creditor to sue his debtor for payment as long as the chain of arrest lasts: and the creditor who did not so act, by giving security or paying, that the arrest was dissolved, is himself the cause why the debtor, impeded by judicial prohibition and the threat of penalty, could not make payment: *arg. l. ult. ff. de lege commiss. (D. 18. 3.)*: and he acts rightly, nor is he guilty of delay, who by the authority of the prætor refuses payment to the prejudice and penalty of the creditor: *arg. l. ult. ff. quod quisque juris in alter. statuerit (D. 2. 2.)*, so much so that he cannot even be compelled if the creditor offer security as to indemnity, nor if the arrest be abandoned by the arrestor, as long as judicial sentence has not decreed that the arrest is abandoned: *vide Rebuffus ad constit. reg. tom. 1. de literar. oblig. art. 6. gloss. 3. num. 64, 65, 66, 67; Peckius*

de jure sistendi cap. 9. num. ult. in fine; *Bort van arresten*, cap. 5. num. 14 et seqq. ad num. 24; where he warns us, however, that the Supreme Court of Holland and Zeeland, notwithstanding the interposition of arrest, is wont to force the debtor to pay, and he also adds the remedies of which the arresting creditors can avail themselves in that case: num. 25, 26.

63. As to the rest, arrest has many consequences in common with verbal citation in law: since it may be regarded as a species of citation in law. And thus it interrupts all prescription in respect of the citer or arrestor, and it makes a temporary action perpetual: since he cannot be said to have been silent who cited in law, nor he not to have been disturbed who has been cited: *l. constitutionibus* 33, ff. de oblig. et act. (D. 44. 7.) *l. sicut in rem* 3. l. 4. in med. *l. cum notissimi* 7. C. de præscript. 30 vel 40 annor. (C. 7. 39.) l. 1. 2; *C. de longi temp. præscript.* (C. 7. 83.) *l. nemo ambigit* 10. C. de acquirend. et ret. poss. (C. 7. 82.); *l. ut perfectius* 2. l. 3. C. de annal. except. (C. 7. 40.); *Peckius de jure sistendi cap.* 35. num. 6; *Andr. Gayl. libr. 1. observ.* 74. num. 20. et seqq. Similarly as an arrest has an adjunct exhibition of petition, it equally with a verbal citation in law induces a pendency and prevention of suit, so that neither can the defendant call an arresting plaintiff, who is unwilling, to another tribunal as to that cause, nor can the plaintiff, if the defendant be unwilling, transfer the suit thus commenced to another forum, although in some places the practice has prevailed that the plaintiff can renounce the suit commenced, and begin a new suit elsewhere even if the defendant is unwilling, which I have more fully discussed in my *tit. de jurisdictione* (ante, bk. 2. tit. 1.) Add also *Peckius de jure sistendi*, cap. 35. n. 1, 2, 4; *P. Bort de arrestis*, cap. 7. num. 2; *Brunnemannus ad l. 7, ff. de judiciis* num. 3; *Mævius de arrestis*, cap. 15. num. 26 et seqq. and the commentators cited by *Gratianus discept. forens.* cap. 906. num. 21, 22; *Zangerum de exceptionibus* part 2. cap. 3; *Dutch Consult. part 4. cons.* 325 or 326; begins "gezien," and *consil.* 328. and part. 5. *consil.* 35. num. 3, 4; *Mysingerus cent. 4. observ.* 26. num. 6; *Merula lib. 4. tit. 40. c. 3. num. 21 in fine.* But this is only so if the plaintiff prosecutes the citation, for if, when he had fixed a day for the defendant, and that day came, the plaintiff is absent, and if the defendant also did not pay, or being present so prayed that the edict of citation should be taken round, there will then neither seem to be an interruption of prescription, nor a prævention, caused by a citation which the citing party has himself rendered illusory and inefficacious by his own absence: *Brunnemannus ad l. 7, ff. de judiciis* num. 3.

64. With us, however, and in those places where commerce flourishes, an arrest does not give to an arrestor a right of hypothec over the things detained by arrest, nor a preference over other creditors, unless perhaps in as far as the expenses of detention, if it have been made for the sake of conserving the thing for fear of diversion: and a second arrestor, or one making a "commendation" as they say, of arrest (see ante) enjoys the same right as the first: nor is a legal hypothec impeded,

even that of later creditors : where, perhaps, during the arrest, the debtor began to carry on a tutorship, to administer the things of the fisc, so that both the fiscus and the future wards are preferent in regard to the things burdened by arrest, over even the arrestor. This has not only been so received on account of the liberty of commerce, lest creditors, induced by the hope of preference, should too easily arrest merchandise, to be delivered often at its own time and place, and this to the great loss of commerce ; but it is also greatly so received on account of the principles of the Roman law themselves. For an arrest is a sort of prætorian mission in possession, by which, although by the Roman law the creditors obtained a right of pledge in so far that the debtor could not, after such putting in possession, alienate his things, unless with such burden of prætorian pledge gained by the creditors, by virtue thereof : *l. si postquam* 3. *l. qui legati* 5. *C. ut in possess. legat.* (C. 6. 54.) joined to § *item si quis* 6. *instit. de action.* (I. 4. 6.) in which respect a "putting in possession" was stronger than our arrest. Yet he who was first put in possession could not, on account of prerogative of time, arrogate any stronger right to himself than those who afterwards obtained such "mission in possession," the rule of law thus failing which otherwise is received in pledges, that he who is prior in time is also stronger in law : *l. is cui* 5, § *qui prior* 3, *ff. ut in poss. legat.* (D. 36. 4.) *l. cum unus* 12, *ff. de rebus auctor. jud. possid. seu vend.* (D. 42. 5.) ; *Peckius de jure sistendi*, cap. 40. num. 7. *et per tit. h. 1* ; *Mævius de arrestis* cap. 19. num. 17 *et seqq.* Although in Saxony and neighbouring places the right of pledge and preference is born, as is witnessed by *Carpzovius defin. foren. part 1. constit. 28. defin. 143*, and many authors cited by him.

65. In what ways, and on what security given, the chain of arrest is loosened, will be stated in *tit. qui satiad. cogant.* (*post, tit. 8*). If the arrestor does not prosecute his arrest, and does not issue the summons on the appointed day, the arrested party lawfully prays absolution from the instance, that the chain of arrest be remitted, and the plaintiff condemned in expenses, damages, and *id quod interest* : *Instruct. Curie Ultraject. tit. van default van de eyschers* ; *Wassenaar pract. jud. cap. 3, num. 14, 15*. As to more about the dissolution of arrest, see *Mævius de arrestis*, cap. 25.

66. A citation in law, whether verbal or real, is the beginning of the institution of all actions : § *ult. instit. de pœnâ temere litigant.* (I. 4. 16.), if it is omitted, nothing which follows can be valid : *l. prolatam* 4. *C. de sentent et interlocution.* (C. 7. 45.) *l. ea quæ* 7. *C. quomod. et quando judex sent. proferre deb.* (C. 7. 48) : so that not even in favour of one not cited, and therefore not appearing, can a judgment given acquire force : for that which is done against the law is void, nor can it become valid on account of the private utility of any individual person. Nor does the argument taken from the case of a minor help to the contrary : viz, that although he is wanting in capacity to appear, yet if, not having it, he still appear, and obtain judgment in his favour, he can reap the advan-

tage: *l. non eo* 14. *C. de procurat.* (C. 2. 13.) joined to *l. cum et* 4. *C. si advers. rem judic.* (C. 2. 27.). For in that case there was not wanting the necessary requisite and basis of trial, for minors who make their condition better, have a legal capacity to appear without a curator, as is said in *d. l. 14.*

67. And by this necessity of citation this is gained, that he who is cited for one case is not to be compelled to respond to another, *l. consensisse* 2, § *legatis* 3, *ff. de judiciis* (D. 5. 1.), because he must not only be present, but ready to answer; for when the plaintiff comes prepared, the defendant must also come prepared, after he has learned for what cause he is cited: *l. 1, ff. de edendo* (D. 2. 13.); *Mysingerus cent. 6. observat. 6. num. 9.* If, however, the adversary be not cited, but is present, and then summoned by the plaintiff answers over, and contests the suit, the trial will be valid. For since citation in law ought chiefly to be made for the reason that the defendant be not condemned undefended, there is nothing to hinder his renouncing this his privilege, and therefore undertake his defence before the judge just as if he were lawfully cited: *arg. l. pen. C. de pactis* (C. 2. 3.); *Donellus ad tit. Cod. de in jus vocando num. 3*; *Anton. Matthæus de judiciis disput. 6. thes. 34.* Add what I have said above as to a neglect of legal form of citation.



L.L.

JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

HIS COMMENTARY ON THE PANDECTS:

WHEREIN, BESIDES THE PRINCIPLES AND THE MORE CELEBRATED
CONTROVERSIES OF THE ROMAN LAW, THE MODERN
LAW IS ALSO DISCUSSED, AND THE CHIEF
POINTS OF PRACTICE.

PART IV.,

BEING

VOL. I. BK. II. (TIT. V. to XIII. inclusive, pp. 137-165).

On Citation in Law, including Arrest (*continued*).

On Citation. Securities.

On Legal Holidays and Dilations.

On Summoning.

(*See over.*)

TRANSLATED BY

JAMES BUCHANAN.

CAPE TOWN: J. C. JUTA.

1881.



LONDON:

PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHURCH CROSS.

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§ See full Index at end of this Part, to Part II. and III. already out. The full Index to Part I. preceded that Part. The full Index to this Part IV. will appear attached to other parts. As stated in the Preface to Part I. these special Indexes are attempts "to embody a reference to each proposition laid down by Voet." Their great value to the student, and especially to the practitioner, is thus self-evident ; for by consulting them and the "Summaries" at the head of each title, which Summaries the Translator has taken much pains "to amplify, so as to make them as perfect a *précis* as possible of the contents of the Title," it is hoped that Voet's views on every point will be very easily ascertained. With this object these Indexes will be carefully continued ; and although the Index of each part may not always (to expedite publication) appear with that particular part, it will certainly appear added to a following part.

Before binding, the Indices may be excised for binding together, or they may be bound as printed and their places noted on the Index to Part I. for easy reference to all the Indexes.

BOOK II. TIT. V.

HOW IF ANY ONE CITED IN LAW HAS NOT GONE: OR,
HOW IF ANY ONE HAS CITED HIM WHO SHOULD NOT
HAVE BEEN CITED, ACCORDING TO THE EDICT.

SUMMARY.

1. He who, cited, does not appear, is to be fined; the fine going to the plaintiff.
 2. The fine ceases if it were to plaintiff's advantage that defendant did not come; or if defendant was a rustic; or was called to a petty judge; or was wrongly cited.
 3. As to contumacy and its punishment, Voet refers to his 11th title of his book, *post*, p. 288.
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1. He who, being cited in law, has not gone, is punished by a fine according to the discretion and the jurisdiction of the judge, whether he be a competent judge to whom the citation was made, or not: for if his competency be doubtful, he ought to come so that he might allege "privilege of the forum," as more fully said in *tit. de jurisdictione* (*ante*, tit. 2. 1. Part II. of this translation): *l. 2, pr. et § 1, ff. h. t.* (D. 2. 5.) *l. si quis ex 5, ff. de judiciis* (D. 5. 1.) Paulus says in *d. l. 2, § 1, ff. h. t.* that the fine must be imposed according to the jurisdiction of the judge, that is, provided the judge had a jurisdiction to which the power of imposing a fine cohered; for to all magistrates the power of fining was not given: *l. aliud fraus est 131, ff. de verb. signif.* (D. 50. 16.) *l. conversine 2, § ult. ff. de judiciis* (D. 5. 1), nor had all power to fine to the same amount: *l. ult. C. de modo mulctarum* (C. 1. 54.) The fine went to the plaintiff citing, who seems to have an action *in factum* accommodated to him (*i.e.*, to meet the facts of the particular case) for its recovery: *arg. l. si per 5, § in eum 1, ff. ne quis eum qui in jus voc. vi exim.* (D. 2. 7); for if the penalty went to the injured plaintiff when the defendant was released by violence, why should it not then also when the defendant has not come? For, certainly, he seems more to condemn the office of the prætor who has escaped by violence, than he who simply neglected to come. As bearing this out, note, that the penalty ceases if it were to the advantage of the

plaintiff that his adversary did not come: *l. 2, in fine ff. h. t.* (D. 2. 5.) which cessation would not be so if the fine were not to be applied to the plaintiff. Not repugnant to this is what is written in *l. pen. C. de modo mulctarum* (C. 1. 54.), that the exact gains from fines ought to be immediately paid over to the public treasury: since that must be taken as applying to fines and penalties levied on account of public or popular crimes, not at all as to those for which there was a condemnation for just cause in private matters, as is manifest from the whole of this book II.

2. The exaction of the fine ceases if it were not to the advantage of the plaintiff: if any one has not come on account of rusticity: or when he was called to a petty judge, or if he were such an one that he could not be called by edict: *l. 2, in fine ff. h. t.* (D. 2. 5.) arg. *l. quod si 3, § si quis 1, ff. ne quis eum qui in jus voc. vi exim.* (D. 2. 7.)

3. The plaintiff when the defendant was unable to satisfy, could also obtain "mission in possession" of his goods: *l. satisque 19, ff. de in jus voc.* (D. 2. 4, *ante.*) As to contumacy and its punishment, both according to Roman and to our modern law, I shall speak more fully in tit. XI.: *si quis caution. in jud. sist. caus. fact. (post.)*

TITLE VI.

THOSE WHO ARE CITED MUST GO, OR SATISFY, OR GIVE SECURITY.

SUMMARY.

1. He who gives suitable security for appearance avoids fine. Rejection of suitable security exposes to action. Among relatives, strict security not so much insisted on.
2. Because we do not deal so strictly with relatives as with friends.

1. He who is cited in law avoids the fine mentioned in the preceding title if he gives security that he will appear on a certain day, giving sureties suitable both as regards facility of summoning and as to means: *l. 1, ff. h. t. (D. 2. 6.)*, *l. 1, ff. si quis in jus voc. non iverit (D. 2. 5.)*, as to which more fully in title VIII. *qui satis. cog. (post, tit. 2. 8.)* If any one rejects a suitable surety when proffered, he will be liable to him (the surety), and to the principal debtor, in an action of injury: *l. si vero 5, § 1, ff. qui satisd. cog. (D. 2. 8.)* Just as, on the contrary, when related persons litigate among themselves, if they refuse to admit any such offered surety, they are fined in 50 aurei: *l. 1, 2, ff. h. t. (D. 2. 6.)*, *l. fidejussor 2, § prætor ait 2, qui satisd. cog. (D. 2. 8.)*, which, however, is only to be taken as to those sureties who are considered as insufficient in means: for if they are unsuitable in respect of facility of summoning, they would not, even as among kinsmen, be considered suitable: *arg. l. pen. ff. h. t. (D. 2. 6.)*, *d. l. 2, § 2, et § quod ait 4, ff. qui satisd. cog. (D. 2. 6.)*

2. The reason of this exception seems to be, that as we must not act harshly, but more mildly, with relatives in citing them in law, *e.g.*, not to cite them without permission, so also must we act in exacting security from them: even although under this appellation of "related persons" some fall to whom the edict of citing without permission does not apply: such as children cited in law by a parent, a wife by her husband, a daughter-in-law by a father-in-law: *l. item pro patrond 2, ff. h. t. (D. 2. 6.)*, *d. l. 2, § 2, ff. qui satisd. cog. (D. 2. 7.)*

TITLE VII.

LEST ANYONE RELEASE WITH VIOLENCE HIM WHO IS CITED IN LAW.

SUMMARY.

1. The penalty of releasing one cited in law is the *real* value of the thing in litigation. If one even released one sued "calumniously" (*i.e.*, vexatiously and unfoundedly) the penalty is the same.
 2. If many release, each is liable *in solidum*. If one release by means of a third person, he is himself liable. "To release" is widely construed, so as to mean causing delay in appearance or loss of thing sued for.
 3. The penalty ceases if the citation were to a clearly incompetent judge, or of a person who could not be summonsed. Or if the released party nevertheless came; or a year has elapsed; or the releaser dies.
 4. It does not cease merely because "fraud" (*dolus*) is wanting. There must be an absence of blame (*culpa*) as well: and therefore the presence of an authority. If the release was under "error of fact," such error does not excuse, even if no fraud: Such error excludes all notion of fraud (*dolus*), but yet does not excuse the violence used.
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1. If any one release with violence any one who is cited in law he is bound by a penal praetorian action *in factum* (*i.e.*, accommodated to facts of case), to him who cited him, not to his heirs, unless so far as it is to their interest: *l. 1, si per 5, § ult. ff. h. t.* (D. 2. 7); the action being to get the value of the thing in litigation, although sought in calumny (*i.e.*, vexatiously and unfoundedly), the estimation of the value to be made by the plaintiff; and that according to the true, and not a fancy price; for in a matter sought "by calumny" this price would probably not rest on a sufficiently probable reason: *l. sed eximendi 4, § item 1, l. si per 5, § in eum 1, ff. h. t.* (D. 2. 7.) Nor should any one think, perchance, that any one calumniously cited in law can be rightly released, and without fear of penalty, because he does not fall under a penalty who releases one cited who should not have been cited according to the edict, say a parent or a patron: *l. 1, § 2, ff. h. t.* (D. 2. 7.) For the reason of the difference lies herein, that as the edict named certain persons who could either not at all be cited, or not without permission obtained, every one could know from the edict itself whether the citation was lawful, or

contrary to the edict: but no one could be certain whether a plaintiff commenced a "calumnious" action, for it was not open to a private person, but to the judge only, to determine that, and to declare it by a definitive sentence.

2. If many persons joined in the release, the others will not be liberated by the satisfaction made by one: just as he himself who is released is not freed from the principal action even if the penalty is already paid by the releaser: *l. si per 5, pen. l. ult. ff. h. t.* (D. 2. 7.) Nor does it matter whether he released him himself, or through another: *d. l. si per 5, pr. ff. h. t.* (D. 2. 7.), and this word "releasing" is here very widely taken, so that it also includes him who causes delay whereby the person cited in law could not come, so that the day of the action passes, or the thing is lost by lapse of time: *l. sed eximendi 4, ff. h. t.* (D. 2. 7.)

3. The penalty of releasing ceases, if the releaser had released one cited to a petty judge, or to a judge most certainly incompetent; or one who ought not to have been cited under the edict; or one who was a slave; or who, although released, nevertheless came; or if a year has elapsed from the release; or if the person releasing have died: *l. 1, § 2, l. 2, § 1. 5, § 2, et ult. ff. h. t.* (D. 2. 7.)

4. No one will avoid penalty because he was without fraud, unless he was also without blame, and thus lawfully used violence, having a just cause of release: *l. sed eximendi 4, § ult. ff. h. t.* (D. 2. 7.), otherwise the violence will be punished by this part of the edict, although fraud be wanting: *l. quod si 3, § ult. ff. h. t.* (D. 2. 7.) What if any one released him whom he thought to be the father or the patron of the citer, and whom therefore he considered cited contrary to the edict? Without doubt he would be amenable to the penalty if it were proved that the person were not the patron or the father of the citer; and therefore the violence would suffice, although the fraud ceased; for the error of fact would exclude fraud: *d. l. 3, § ult.* (D. 2. 7.)

TITLE VIII.

WHO ARE BOUND TO GIVE SECURITY, OR TO PROMISE ON OATH, OR MAKE RE-PROMISE.

SUMMARY.

1. Person cited must satisfy his adversary, either by payment, compromise, or security, &c. Security is of different kinds; personal, pledge, or oath-security, or personal re-promise. The plaintiff was also required by the Roman law to give certain security; but this has ceased by the Dutch law, except that where he is a peregrine, or "suspect," he must give security for costs, and to answer in reconvention; or where he is a plaintiff in arrest, then as to expenses of arrest, and aliment until hearing, if demanded by arresting officer, or arrestee. Is the surety also bound for deterioration of thing arrested? Yes, if he was generally surety; not if specifically for costs. See Tit. 46. 1. 12. An honorable peregrine plaintiff if he cannot find sureties, may give oath-security: or pledge security; or unimpeached sureties resident out of the territory.
2. Defendant gives "suitable" security *de sistendo*, i.e., to appear, and to remain in Court till the end of the suit. Sureties not subject to the jurisdiction of plaintiff's judge are "unsuitable:" so also are women in certain cases, soldiers and minors: unless they give security *in rem suam*. In forced securities, defendants unable to give local security can give security elsewhere, under conditions. But not in voluntary securities. If unsuitable sureties given, regarded as no sureties: fresh ones given.
3. "Unsuitable" are those of no means. If it is maintained they *are* of means, an arbitrator is appointed to settle the point. If poor sureties are once accepted, they continue: for defendant is not to be continually bothered to change sureties, and plaintiff is himself to blame for his ready acceptance of a poor man. Poverty is no bar to contract or to suretyship; but womanhood and minority are. If rich securities, however, suddenly and unexpectedly, become poor, new ones may be demanded, and given after inquiry.
4. Formerly illustrious persons and owners of immovables only gave oath-security. Nowadays, however, all persons are alike bound to give personal security, if they can. If defendants cannot find security, they give oath-security and take oath of calumny as to their inability to find security.
5. The Fisc and the State only make "re-promise" to remain.
6. This security *de sistendo* is more rare nowadays. It is more the custom for a peregrine defendant to choose domicile in plaintiff's territory. Unless it is a criminal proceeding, or a proceeding in arrest, for in those cases the security must be as to appearing: and subject securities must be given, unless waived by the plaintiff. Sureties having some special privilege of forum may become

- competent on the renunciation of such privilege. If plaintiff does not prosecute arrest, such arrest does not *ipso facto* cease, but defendant prays its dissolution, and gets it without security; and gets costs, and *id quod interest*.
7. If defendant cannot find personal security, he can give pledge-security, depositing gold, &c. Or give oath-security with hypothec of immovables at the place of trial, but not of foreign immovables: especially if these foreign immovables are at a place where "letters requisitorial" are refused, or where execution is not, on principles of comity, allowed to foreign judgments. If, however, principles of comity prevail, the judge may be more yielding; and if the defendant be of honourable character elsewhere, accept oath-security: especially if the arrest be more or less vexatious. On approved security, the arrestee is discharged, or unless he were stayed to give evidence: or if the debt is clear and liquid and perhaps already adjudicated and confessed. For he should then pay, and not give security *pro* adjudged payment. This would be vexatiously reopening decided cases under the guise of securityship. Where payment is ordered, satisfaction in other ways is insufficient, and much less is security so.
 8. Voet's opinion is that in arrest for actions of "injury" the arrestee is likewise discharged on security: whether the action is for apology or damages. Decree of recantation or apology can be assessed, and surety condemned therefor. Voet mentions *in prin.* "*cum enim*," &c., that criminal accusation for "injury" is not the custom by the modern Dutch law (*ex moribus*).
 9. Security being rejected by the judge, as insufficient or non-exigible, an appeal lies: or, if the plaintiff thinks the accepted security really insufficient, he may appeal. But if appeal is omitted, he cannot proceed against the judge, unless there is fraud. For it is received practice that a judge is not liable unless he decide fraudulently. Decrees as to security are matters of fact, and error of fact is more readily excused than error of law.
 10. In many places it is the custom not only to require the defendant to give security that he will appear (*de sistendo*), but also as to satisfying the judgment (*judicatum solvi*). But Voet says nowadays the exaction of the latter is not so much in use in many places where commerce prevails, unless in case of a peregrine, a pauper, or one suspected of flight. But in arrest to strengthen jurisdiction both are taken. Whether one or both forms of security is taken, and how it is to be taken, depends on local custom.
 11. Differences between security as to appearing and security as to satisfying the judgment are: (a) the former expires with the defendant's death, not the latter: (b) the former ceases with the sentence, not the latter. The modes of taking both, and the tests as to their sufficiency, are similar.
 12. Coheirs and partners, when sharers in a suit, are suitable sureties for each other reciprocally, as to satisfying the judgment: if otherwise suitable.
 13. Parents cited by their children must give these securities: for the reverence otherwise accorded to them does not extend so far as to remit this security. Tutors of minors and curators of wards, &c., do not give these securities: they pledge the goods of the minors for the satisfaction of the judgment, and this even without special decree. And are not *personally* liable in execution of a judgment against the wards, &c.
 14. The security as to satisfying the judgment has three parts, (a) to satisfying the judgment as to the thing itself; (b) to protect that thing; (c) to be without fraud. As to the "quantity" of these securities, that is uncertain at the beginning of the suit. But it is certain at the end: for then while it is still a question whether judgment will be given, and for how much: there is a judgment and the amount is a liquidated one.
 15. The clauses (b) and (c) of this security have effect, and can be proceeded on, *before* sentence, if thing is not protected, or there is fraud. Clause (a), not till *after*

judgment. After judgment, the surety is liable for its amount and costs, and also *id quod interest*, if decreed. Surety only liable for what specially decreed.

16. Postponements of payments conceded to the defendant benefit these sureties also. But these sureties have not the benefits of order and division: and this whether they have specially renounced their rights, or not.
17. Sureties for satisfying a judgment are, immediately on judgment, liable to execution without any necessity for a new suit on such judgment. This is contrary to the rule as to other sureties; but Voet thinks it is with reason the approved practice. He shews why. Such surety has also then recourse against the principal debtor, on such judgment; and likewise executes on it immediately.
18. The security as to satisfying the judgment ceases if the summons and the nature of the action, or the person of the plaintiff or defendant, is thereafter changed. For such change is virtually a change of obligation.
19. Also if the judge is changed. Is he who was surety as to the judgment before a lower judge, bound for the judgment of a higher judge on appeal? This is a moot point. Voet thinks if the defendant was defeated below, and that judgment is confirmed, the surety is bound. If defendant won below, and loses above the surety is not bound, and this whether he was surety specially or generally. To remove all doubt, however, it is safer to frame the deed of suretyship to cover the appeal judgment as well.

1. WHOEVER is cited in law ought either to "satisfy," that is, fulfil the desire of the adversary, whether by payment, compromise, or other modes in which the adversary will allow himself to be discharged: *l. 1, ff. h. t. (D. 2. 8.)*; *l. promissor 21, § ult. ff. de constit. pecunia (D. 13. 5.)* Or to give security, so that he secures his adversary as to the subject of the suit, sometimes by satisfaction, sureties being given, sometimes by pledge-security, sometimes by oath-security, sometimes by binding oneself, by verbal re-promise, for the sufficiency of his person, *§ sed hodie 2 Instit. de satisfaction. (I. 1. 24.) d. l. 1, ff. h. t. (D. 2. 8.)*, so that he who cites is in turn also bound to interpose a guarantee in security of the person cited. And this lest trials should be rendered illusory by the shifts of the plaintiff or defendant: *arg. l. 1, § 1, et 3, ff. de stipul. prætoris (D. 46. 5.)* The plaintiff gives security that he will contest the suit within two months from the time of the issue of the summons, sometimes under a discretionary penalty, sometimes under the penalty of double the damage done, the security not, however, to exceed 36 *solidi*: further that he will remain throughout the trial, even until sentence: *nov. 53. cap. 2. nov. 96. cap. 1* (see more fully *Cujacius ad d. nov. 96.*) Lastly, that he will, if defeated, pay a tenth part of the sum mentioned in the summons by way of expenses: so that this security which obtained of old, and in intermediate times had fallen into desuetude, *§ 1. in fine Inst. de poenâ temere litig. (I. 4. 16.)*, was reintroduced by the latest law: *novell. 112. cap. ad excludendas 2. auth. generaliter C. de epis. et clericis (C. 1. 3.)* But in trials nowadays, these securities on the part of the plaintiff have ceased to be interposed; and if he be a peregrine, having his domicile elsewhere, or be otherwise "suspect," he is compelled

to give security to the fullest amount (*ad summum*) of the costs of the suit, in case he should be condemned in them, and to enter on the case in reconvention. This security as to costs some have called a "security to pay the judgment" (*judicatum solvi*), in so far as it is comprehended in the sentence of the judge that the plaintiff should pay the expenses of a suit rashly brought. Or, if the plaintiff cite the defendant in law by means of arrest, then he must give security for the costs of arrest and for giving aliment to the party arrested, whenever a more careful arresting officer, or maker of prisoners' lists (*commentarienses*), or the owner of the buildings in which things are deposited for public custody, or the arrested person himself, should demand it: *Peckius, de jure sistendi cap.* 42. num. 5; *Neostadius Curie supr. decis.* 1. in med.; *Paulus Voet ad § 5. Instit. de satisd.* nu. 2; *Wassenaar, pract. judic.* cap. 1, num. 64, 65; *Christinæus, ad Leg. Mechliniens. tit.* 7. art. 19; *Leeuwen, Cens. Forens. part* 2. libr. 1. cap. 26. num. 10; *Petrus Bort van arresten cap.* 6. num. 3 et 15. Whether when this security is given as to paying the expenses of arrest, the fidejussor is bound, beyond the expenses, also in respect of the deterioration of the thing detained by arrest, will be treated of in *tit. de fidejussoribus* (*post*, tit. 46. 1. 12.) [It is there laid down that the surety is liable for deterioration if he be a general surety, but not if he were simply surety for expenses.—*Transl.*] If a peregrine plaintiff cannot find a fidejussor at the place of trial, and yet is bound by the custom of the forum to give security, especially in reconvention, and is of honourable character in other respects, it seems he will be permitted to give the oath-security: *arg. novell.* 112. cap. 2. *instructio Curie Brabantinæ art.* 507; *Christinæus, ad Leg. Mechliniens. tit.* 7. art. 19. num. 6; *Pyrrhus Maurus de fidejussorib. in præludiis sect.* 3. cap. 25. num. 21, or at least the pledge-security, or fidejussors of another territory admitted as suitable in other respects: *arg. l. si fidejussor* 7, § 1, ff. h. t. (D. 2. 8.)

2. The defendant, on the other hand, gives security in divers modes, according as he wishes to litigate by himself or by an attorney: if he is ready to defend the action himself, he interposes security to appear, if the plaintiff so desires it, by which security he promises that he will appear in law, and stop in Court to the end of the suit, § *sed hodie* 2. *Instit. de satisdat.* (I. 4. 11.) For this purpose sureties are often given, suitable in means and in facility for summoning, according to the quality of the defendant: *l. fidejussor* 2. in *pr. ff. h. t.* (D. 2. 8.) For which reason they are not regarded as suitable who are not subject to the jurisdiction of him before whom the defendant is to appear, whether they dwell in the territory of another judge, or, if resident in the territory of the same judge, are armed with the privilege of a particular Court, unless they renounce the privilege of that Court and submit to the jurisdiction of him to whom the citation in law is made: *l. 1, ff. si quis in jus vocat. non inquit* (D. 2. 5); *l. si fidejussor* 7, ff. h. t. (D. 2. 8.) Although it is necessary to give this security as to appearance, to be interposed when the prætor orders it, yet if the defendant cannot easily furnish it when

he is summoned, he will be heard if he is ready to give security in another state of the same province, and can interpose the oath as to "calumny": *l. si fidejussor* 7, § 1. *de die* 8, § *jubetur* 5, *ff. h. t.* (D. 2. 8.) It is otherwise in voluntary securities, in which everyone should impute it to himself that, pressed by no need, he imposed on himself the necessity of security: *l. si fidejussor* 7, § 1, *ff. h. t.* (D. 2. 8.) Unsuitable also, on account of the "difficulty of summoning," are slaves, *filiifamilias*, in cases in which no action as to their peculium is given them, women protected by the Vellejanian exception, soldiers, minors, unless they give security *in rem suam*, as for their own attorney. And if such unsuitable sureties were given, security does not seem to be given, because the promise was not fulfilled, whether in cases of voluntary suretyship nor in the necessary suretyships under the order of the prætor; thus there must be security given anew: *l. de die* 8, § 1. 2, *ff. h. t.* (D. 2. 8.); *l. qui satisfacere* 3, *ff. de fidejuss. et mandatorib.* (D. 46. 1.)

3. If sureties are insufficient in means only, they can be lawfully disapproved by the plaintiff, and if the defendant again assert that they are suitable, an arbiter is to be appointed to test the sureties: *l. si vero* 5, § 1. *l. arbitrio* 9. *l. si ab arbitrio* 10, *ff. h. t.* (D. 2. 8.); but if they were voluntarily admitted, he who willingly admitted them ought to be content with them, nor can he force the defendant to give other new sureties, for the defendant is not to be every moment burdened with the trouble of giving security, and the plaintiff must bear the cost of his own readiness in, knowingly or unknowingly, receiving the fidejussion of such securities; for he ought not to be ignorant of the condition of those with whom he contracts: *d. l. si ab arbitrorii* 10, § 1, *ff. h. t.* (D. 2. 8.); *l. si is* 3. *in fine ff. ut in possess. legat. vel fideic. serv. causa esse liceat* (D. 36. 4.) joined to *l. qui cum alio* 19, *ff. de regul. jur.* (D. 50. 17.) The reason of the difference is, that when a poor surety is admitted, it cannot be regarded that such satisfaction is against the law, and therefore it is neither vitiate nor null; for nowhere is it found prohibited that a pauper may contract with others, or be surety for them, for poverty and opulence neither increase the ability to contract, nor diminish it, nor change it. On the other hand, however, slaves, women, and the like, are forbidden to intercede in law for others, so that *their* fidejussion is disapproved by law, and is thus vitiate; and it is accordingly considered that no security has been given: *quotiens* 6. *l. de die* 8, § 1, *ff. h. t.* (D. 2. 8.) Clearly if the sureties were opulent when admitted, but meanwhile a great calamity, and a large loss of estate has fallen upon them by an unexpected blow of fortune, on the cause being inquired into there will be surety taken anew, for prætorian stipulations are very often to be interposed when the security has ceased without the fault of the stipulator: *l. si ab arbitrio* 10. *in fine ff. h. t.* (D. 2. 8.); *l. plane* 4, *ff. ut in possess. legat. vel fideic. serv.* (D. 36. 4.); *l. prætoris* 4, *ff. de prætoris stipulat.* (D. 46. 5.)

4. There are some, however, to whom the necessity of giving security as to appearance is remitted, and for whom the oath-security is enough,

as, for instance, illustrious persons, and possessors of immovables, enumerated in *l. sciendum* 15. *passim ff. h. t.* [After stating the Roman law to this effect, Voet adds:] But with us nowadays the possessor of immovables, or of conspicuous dignity, cannot, on that ground only, claim for himself immunity from the necessity of security, if he be not unable to give security: *Groenewegen, ad l. 15, ff. h. t.; Berlichius, part 1. conclus. 74. num. 171; Andr. Gayl, de arrestis, cap. 4. num. 15.* Those who cannot find suitable sureties may give oath-security to appear, and as to the fact that they cannot find suitable sureties they interpose the oath as to calumny: *arg. novell. 112. cap. 2. novell. 134. necessarium 9; l. de die 8, § pen. ff. h. t. auth. generaliter C. de episc. et clericis (C. 1. 3.)*

5. The Fisc and the State only make answering promise as to appearance: *l. 1, § si ad fiscum 18; l. si quando 6, § 1, ff. ut legat. vel. fideic. serv. caus. cav. (D. 36. 4.)* Sometimes, also, the clergy do so: *vide l. cum clerici 25, § 1, l. omnes 33, § in hac autem 3. C. de episc. et clericis (C. 1. 3.); novell. 123. cap. si quis contra 21, § si quis autem 2.*

6. This security as to appearing is more rarely used in judicial proceedings nowadays; and in lieu thereof has succeeded the practice that a peregrine-litigator cited in law is forced to choose his domicile in the territory of the judge, that he may be sought for and cited there whenever necessary, as *Groenewegen* proves by many authorities: *ad § 2. Instit. de satisdat. (I. 4. 11.)* But it still prevails if the proceeding be a criminal one, or if there be a real citation in law by the detention of person or goods; for the chain of arrest is not sooner regularly loosened than when suitable sureties are given for appearance: sureties immediately subject to the jurisdiction of the judge—even of an inferior one, as of a town or village—before whom the litigation is, as before said, unless the plaintiff wishes to be content with peregrine-sureties, otherwise suitable: Consult *Dutch Consultations, part 1. cons. 188; Christinaeus, ad Leg. Mechlin. tit. 3. art. 7. num. 7; Peckius, de jure sistendi cap. 45. num. 14; Ant. Faber, Cod. libr. 2. tit. 39. defin. 11; Radelant, Cur. Ultraject. decis. 66. num. ult.; Groenewegen, ad l. 7, ff. h. t. (D. 2. 8.)* If, however, one having his domicile in the place of trial itself is not, on account of special privilege of forum, subject to the judge before whom the suit is brought, he will yet be considered a suitable surety as to appearing if he either specially or generally renounce such privilege of the forum: *arg. l. pen. C. de pactis (C. 2. 3.); l. 1, ff. si quis in jus voc. non ierit (D. 2. 5.); Jac. Coren, observ. 39. num. 14, 15.* This, if he who procured the arrest prosecutes it; if he does not proceed further with the suit within the time fixed by the custom of the country, or does not press his petition on the appointed day, the force of the arrest does not actually vanish *ipso jure*; but the defendant will, without any security, obtain the dissolution of the arrest, and an absolution from the instance, the plaintiff being condemned in the expenses and in *id quod interest*: *Wassenaer pract. judicial. cap. 3. num. 14, 15; P. Bort, van arresten cap. 6. num. 21,*

26, 33 in fine; *Peckius, de jure sistendi cap. 38*; *Rebuffus, ad constit. regias tom. 1. de literar. oblig. art. 6. gloss. 3. num. 67.*

7. If he cannot find a surety, it seems he will be permitted to give a sufficient pledge-security, at the discretion of the judge: arg. l. 1, § *jubet autem* 9, ff. *si collation.* (D. 37. 6.), a deposit of gold or silver, or other things, being made in lieu of security. Nay the judge will not unjustly allow an arrested stranger to give oath-security, together with a hypothec of immovables situated at the place of trial, if he swear that he cannot find sureties: *Christinæus, ad Leg. Mechlin. tit. 3. art. 7. num. 8*; *Peckius, de jure sistendi cap. 45. num. 8 et 11*; *Groenewegen, ad l. 15, ff. h. t.*; *Berlichius, part 1. conclus. 74. num. 169, 171*; although, otherwise, prætorian stipulations (which this is) require the interposition of persons, and are neither satisfied with pledges nor with the deposit of gold, or silver, or money, in stead of security: l. *prætoris* 7, ff. *de prætoris stipulat.* (D. 46. 5.) But certainly an oath-security, with hypothec of immovables situated in another territory, will not seem sufficient for obtaining the dissolution of arrest; because arrests, which are now in vogue for the purpose of strengthening jurisdiction, are, we have said, mostly introduced for the purpose that the plaintiff may litigate at his own residence, and there recover his debt from the peregrine, which purpose would be departed from if he was bound in a new suit to follow up and excuse pledges situated elsewhere, beyond the place of his domicile. The same reason why sureties (as to anyone's appearing) who are not subject to the jurisdiction, cannot be admitted, as has before been said, also manifestly militates as to not admitting pledges elsewhere situated, especially if the things be situated in those places in which it is not usual to grant "letters requisitorial" (as they are called), and where there is no execution, by comity, of a sentence elsewhere given, but where the suit is to be wholly instituted anew and *ab ovo*, as they say, as in *Gelria: vide Radclantius, Cur. Ultraj. decia. 66*; *Bort, van arresten cap. 8. num. 12.* Certainly, if the amount of the debt to be recovered is not so very large, and the wealth of the arrested party at the place of his domicile is evident, and if, at that place, judgments elsewhere passed be favourably viewed, and if execution is granted on such judgments elsewhere passed, and if the person arrested is ready, by taking the oath of calumny, to assert that he cannot find sureties, it may not unreasonably be attempted whether, after contestation of the suit, the judge may not with sufficient justice admit him to give the oath-security in such case; because in this conditional way the plaintiff conducts the whole suit to its end at his own home, and thus obtains the object and scope of arrest; and it is always the duty of a judge to take care that securities are not exacted to a heavier measure than the necessity of the case demands, lest he aid the desires of those who do not so much study to benefit themselves as to delay the dissolution of a frivolous arrest and to abuse imprisonment, not for security of detention, but for punishment and vexation: *Andr. Gayl, de arrestis cap. 3. num. 11: Bort, van arresten*

cap. 6. num. 22. *et* cap. 8. num. 14, 15. However that be, this is clear, that when such security is regularly offered as the judge certainly ought to think sufficient, and which the plaintiff could not lawfully carp at or disapprove, the arrested stranger was to be discharged, nor could he before condemnation be incarcerated for a civil debt. Thus was it laid down in the *groot Privilegie van Vrouwe Maria van Burgundien aen Holland en Zeeland* 14 Maart 1476, vol. 2. *placitor. pag.* 669. *ferè in med.*; and it is thus everywhere received in practice and known to all, with only a few excepted cases. For he is not to be set free on security who was arrested to give evidence in another's cause, for often he but thus calumniously seeks delay and attempts to defer the declaration of the truth to another time, whereas by responding truly according to the conscientious dictate of his mind, or by professing his ignorance, he could be immediately discharged, and relieve himself of the burden of arrest: *Menochius, de arbitrar. jud. lib. 2. casu.* 303. num. 26, 27; *Peckius, de jure sistendi cap.* 45. num. 6; *Bort van arresten cap.* 8. num. 20. Nor is he set free on this security who is arrested for payment of a debt in all respects liquid, as where he has already been condemned to pay it by the sentence of the judge, or has confessed that he owed it; for if for payment there were substituted, without the consent of the adversary, security for payment, it would happen that obligations would follow on obligations, and there would be hardly any end to law suits, contrary to *l. si se non obtulit* 4, § *ait. prætor* 3, *ff. de re jud.* (D. 42. 1.); nor is it just that suits once settled by the sentence of the judge or by confession, which is equal to judgment, *l. 1, ff. de confessis* (D. 42. 2), should be again opened up and renewed under the veil of securityship. And if he cannot free his things from the bond of pledge who, when he ought to pay, was ready to satisfy in some other way than by payment, according to *l. quod si non solvere* 10, *ff. de pign. act.* (D. 13. 7.); *l. item liberatur* 6, § *qui paratus* 1, *ff. quib. mod. pig. vel hypoth. solv.* (D. 20. 6.), much less is he to be listened to who does not even offer satisfaction, but only security, for the purpose of obtaining his discharge, for it is less to give security as to appearance than to satisfy: *l. 1, ff. h. t. Andr. Gayl, de arrestis, cap.* 11. num. 8, 9; *Sande, decis. Frisic. libr. 1. tit. 17. defin.* 2; *Wassenaer, pract. jud. cap.* 1. num. 20; *Jacob Schullens ad Modestin Pistoris part.* 3. *quest.* 110. num. 35 *et seqq.*; *Scharpfus, cent.* 3. *consil.* 15. num. 15 *in fine*; *Berlichius, part.* 1. *conclus.* 74. num. 175, and many others there cited.

8. Although some refuse this discharge from arrest to him also who, by means of arrest, has been summoned in an action of "injury" by him whom he injured, yet it does not seem this ought to be approved, for since he who has suffered an injury institutes, according to our customs, no criminal accusation, but can only proceed civilly *ad palinodium* (for apology), and a pecuniary estimate of the injury, nothing forbids this security being admitted for obtaining the remission of the arrest. Whether you regard the money penalty, or the act of recantation, it is clear that both debtors of the money or the act, on offering security, to

be left to their own discretion, are free from arrest. Nor is it doubtful that the act of recantation can be estimated at a certain price, or that a surety may be condemned therefor: *Boerius, decis. 315. in pr. Dutch Consult. part. 1. consil. 180. vers. dunkt voorts. And it was thus decided in Ultrajectine 4 June 1674, and confirmed in appeal; also 5 July 1679.* And thus it is accepted practice that those criminally accused, if the proceeding be for a fine and not for corporal punishment, may be liberated, on security, from public custody, according to *Menochius, de arbitrar. jud. lib. 2. casu. 303; Jacobo Coren, consil. 1.*

9. If to one who is arrested, and offers security, the judges decide by their interlocutory sentence that a freeing from the arrest is to be denied, either because they regard the security as insufficient, or because they think that in that particular case the power of offering security ceases, it is free to the defendant to appeal from such sentence, as continuing an irreparable injury; so that, the cause being inquired into, and the parties heard, the denied remission of arrest may be adjudicated on. For as it is not a light lesion or injury that he should be dragged into law who offered sufficient suitable security, so is it not a less lesion and injury that he should be longer detained in arrest who has already given security: *l. si vero 5, § 1, ff. h. t. (D. 2. 8.), joined to l. ante sententiam 2, ff. de appell. recip. vel non (D. 49. 5.), l. arbitr. 9, ff. h. t. (D. 2. 8.) Dutch Consultations, part. 1. consil. 180. et part. 5. consil. 122.* If however the Court of Holland interposed a decree of arrest, but it has not yet been given over for execution, the person to be arrested may appeal from that decree, nor is he bound to expound his case before the decreeing Court, but to the superior judge on appeal: which is otherwise with inferior judges. See *Bort on arrests, cap. 8. n. 34 et seqq. usque ad finem.* But if, when suitable security has been admitted by the judge, and a decree interposed as to dissolution of the arrest, the plaintiff has not appealed, and thus afterwards continues being damnified, he cannot proceed for indemnity against the judge, where the judge is without fraud: because he who pronounces a surety suitable when he is not so, errs more in fact than in law, and in matters of fact the most prudent are to be condoned: *arg. l. 2, ff. de jur. et fact. ignor. (D. 22. 6.):* and also because it is received in practice that judges deciding badly do not make the suit their own, unless their deceit be manifest: *Neostadius Curiae supr. decis. 61.* See more as to appeal in cases of arrest in *Mævius, de arrestis, cap. 21.*

10. Moreover, although by the later Roman law a defendant himself present ought only to interpose security as to appearance, not as to satisfying the judgment, whether he were summoned in a personal or a real action, § *sed hodie 2. Instit. de satisfaction. (I. 4. 11),* yet in many places it has become the custom, and especially in those in which the exercise of commerce is more frequent,—that whenever, by means of arrest, any peregrine has been cited in law, for the purpose of strengthening the jurisdiction, the chain of arrest is not otherwise relaxed than if he has given security both as to appearing and as to satisfying the judgment:

security as to appearing only, not sufficing, lest otherwise a suit be purposely protracted by the arrested party, who has only given security as to appearing, and in the meanwhile, through the intervening death of the party to appear, all force of the security as to appearing has vanished: *Andr. Gayl, de arrestis, cap. 3. num. 12*; *Christinssus, ad Leg. Mechliniens. tit. 3. art. 6. num. 2 and 3*; *Petrus Peckius, de jure sistendi, cap. 45. num. 8 et 7 in fine*; *Petrus Bort, de arrestis, cap. 8. num. 4 et seqq. ad num. 12*; *Berlichius, part. 1. conclus. 74. num. 168*; *Sande, decis. Frisic. libr. 1. tit. 17, def. 2*; *Carpzovius, defin. forens. part 1, constit. 30, defin. 19 in fine et d. part 1. const. 29. defin. 40. in pr.* Although even this security as to satisfying the judgment is nowadays not so much in use, unless one of the litigants be a peregrine, or a pauper, or suspected of flight: *Groenewegen ad § 4, Instit. de satisfat. (I. 4. 11)*, and many commentators there cited: *Paulus Voet ad § 5. Instit. de satisfat. num. 2.* Whether both security as to appearing and as to satisfying the judgment are to be enjoined, or whether security as to appearance only will suffice; and, generally, in what way security is to be given, must be defined by the usage of each place in which the dissolution of the arrest is sought, and the security is to be given; arg. § *pen. et ult. Inst. de satisfat. (I. 4. 11.)*

11. Security to satisfy the judgment differs from security "as to appearing," not only in this, that the security as to appearing ceases with the death of the defendant: *l. si decesserit 4, ff. h. t. (D. 2. 8.)*, not so that as to satisfying the judgment; for payment can be made after the death of the defendant, but a dead man cannot be made to appear: arg. *l. 1. C. de fidejussor. et mandator. (C. 8. 41.)*; but also in this, that one giving security as to appearing is not bound any longer after the sentence, by force of the security: but he who has promised as to satisfying a judgment remains always bound so to satisfy; which Ulpian means in *l. Græce 8, § et post 3. in fine ff. de fidejussoribus (D. 46. 1.)*, when he distinguishes between the fidejussor of an "adjudged action" whom he calls also the "fidejussor of the whole cause," and a fidejussor of only one suit being tried. And although in a suretyship as to satisfying the judgment, not only the defendants themselves, but especially the "defenders" of the defendant, are bound to give security, since no one is understood to be a suitable "defender" of another without this security: § *si vero aliquis 4. 5. Instit. de satisfat. (I. 4. 11.)* Even if he were a related person: *l. filiusfamilias 14, ff. h. t. qui satisfat. (D. 2. 8.) cog. l. exigendi 12. C. de procuratoribus (C. 2. 13.)*, yet, as to interposing this security, even plaintiffs are, in a manner bound, as has been said before: and as to this kind of caution a title occurs in the 46th book of the Pandects; and having said before that this security is now still frequently joined to the caution as to appearing, it will not be beside the question to treat it in this place: especially as from what has been before laid down this security can in part be explained. In the ways in which the security as to appearing ought to be interposed, and when it is

to be admitted as suitable or rejected as unsuitable, in those ways also that security which is given for satisfying a judgment ought to be interposed, and estimated as sufficient or void.

12. This must not be passed over without remark, that several co-heirs or partners, sharers in the same suit, may give security for each other respectively, as to satisfying the judgment, by a mutual suretyship, nor ought they to fear being disapproved by the adversary if they are otherwise suitable in means and in facility of being summoned: for in such case each one is not surety for himself, but each for the other.

13. Nor are parents cited in law by their own children free from the giving of this security: it is accorded to them, out of reverence, that they cannot be cited in law without permission, but nowhere is the necessity remitted to them of giving "security as to satisfying the judgment:" nay, they are rightly forced to interpose security as to appearing: *l. fidejussor 2, § prætor ait 2, ff. h. t. (D. 2. 8.)*, *l. 1, ff. in jus vocati ut eant aut satis. vel cautum dent (D. 2. 6.)*; and therefore with the greater reason are they forced to give security as to satisfying the judgment; lest otherwise it should be in their power to render judicial proceedings commenced against them illusory; and that this should not happen, this security has been introduced: *l. 1, § 1, ff. de prætoris stipulat. (D. 46. 5.)* Nor ought so much to be accorded to reverence that the validity of judicial proceedings should be prejudiced. And although children are ordered in *d. l. l.*, to be contented with any sort of surety given as to appearing, yet that ought not, it would seem, to be extended, without a law to that effect, to a security as to satisfying a judgment: *Carpzovius, defin. forens. part. 1 constit. 5. defin. 22*. If, however, tutors or curators of wards or adults, summoned into court, undertake the defence, they are to be burdened by no security for the issue of the suit, or as to satisfying the judgment; since they themselves would never have to suffer an execution over their own goods in satisfaction of the judgment; but liberty is given to them to pledge for a judgment the goods of the minors, which they administer, without even obtaining a decree for that purpose: *l. ult. § defensionem 3. C. de administrat. tut. (C. 5. 37.) l. 1, § 2; arg. l. vulgo 23, ff. de adminis. et peric. tutor (D. 26. 7.)*; *Brunnemannus, ad. d. l. 1. num. 6; Gratianus, discept. forens. cap. 225, num. 32*.

14. That there are many "clauses" or "parts" of this security as to satisfying the judgment, the Emperor says in *§ si vero aliquis 4. Instit. de satisdat. (I. 4. 11.)* And Ulpian says that it has three clauses gathered in one: the first of which is as to the judgment, that is, as to satisfying that which is comprehended in the sentence of the judge; the second, as to the thing to be defended, according to the discretion of a "good man;" the third is as to fraud, that is, that fraud must be wanting and continue so: *l. judicatum 6. l. cum quærebatur 13. l. novissima 19, ff. judicatum solvi (D. 46. 7.)*. This security contains in its inception and at the time of its interposition an uncertain quantity, inasmuch as it was then uncertain

whether the judge would, after hearing the case, condemn in anything at all, and if he did condemn, for what: *l. prætoris* 2, § *incertam* 2, *ff. de prætoris stipul.* (D. 46. 5): but looking at it at the end of the suit, and at the time of sentence passed, it is said to have a defined quantity: since it is of force for as much as the judge pronounced: *l. judicatum solvi* (D. 46. 7.)

15. The force of this security, rightly interposed, is that as regards that part which is framed as to the thing to be defended, and as to fraud, it is of effect even before sentence, and can be proceeded upon, whenever either fraud has intervened or the thing is not defended as a whole in the place where it should be defended: *l. ex clausula* 17. *junct. l. jam tamen* 5, § *ult. l. novissima* 19, *ff. judicatum solvi* (D. 46. 7.) But in as far as it refers to satisfying the judgment, it cannot be of effect until after sentence, since, in natural reason, it is uncertain beforehand what and how much should be prayed for. When, then, the defendant is condemned, the surety can be summoned on his own promise for that which has been adjudged, and not only thus, for the thing itself in litigation, but also for the costs of suit, and *id quod interest*, if this is also comprehended in the sentence passed against the defendant, and, if the adversary has got judgment for it; for the stipulation as to satisfaction of the judgment was only of force for what the judge pronounced, as is laid down by Ulpian: *l. judicatum* 9, *ff. judicatum solvi* (D. 46. 7.); and for what he decided: *l. pen. ff. judicatum solvi* (D. 46. 7.); *Hippolytus de Marsiliis de fidejussoribus* num. 187.

16. Although postponements of payment conceded by law to the party condemned—e.g., the postponement of four months—attach also to sureties for satisfying judgment: *l. 1, ff. judicatum solvi* (D. 46. 7.) *l. ult. § ult. C. de usuris rei judicatas* (C. 7. 54.); yet there are some particular rules received in practice concerning these, for they will not enjoy the “benefit of order,” even if they have not nominately renounced their rights at the time of fidejussion. For as this security is interposed for the sake of the judgment, that it may be carried out: *l. 1, f. 1, ff. de prætoris stipulationibus* (D. 46. 5.); most of all would it be carried out when it has most parate and prompt execution; it can be seen from the intention of the prætor ordering security to be given, that there is a tacit renunciation of those rights by which the strength of the judgment would be retarded. For it is the duty of the prætor to interpret this stipulation, nor is the intention of the contracting parties so much to be regarded in this kind of suretyship as that of the prætor himself who orders it to be taken: *l. in prætoris* 9, *ff. de prætoris stipulat.* (D. 46. 5.) So that the contracting parties cannot change anything in it, nor add nor detract, but must only take the sense and the law as to what has been done in arriving at the intention of the prætor: *l. in conventionalibus* 52, *ff. de verbor. oblig.* (D. 50. 16). And although by the Roman law if many were sureties as to satisfaction of judgment they were not without the benefit of division: *l. si ex duobus* 14. *l. ex*

judicatum 16, ff. *judicatum solvi* (D. 46. 7.) Yet it has become the practice that this is almost everywhere now denied even to them, on the analogy of the benefits of "order": *Anton. Faber, Cod. libr. 8. tit. 28. defin. 8*; *Johan. Papon. libr. 10. tit. 4. arrest. 1. et in appendice d. tit. 4. arrest. 7*; *Louet en ses arrests lib. F. arrest. 23*; *Dutch Cons. part. 3. vol. 2. cons: 18. num. 1*; *Groenewegen, ad l. ult. § 1, C. de usuris rei judic.*; *Paulus Voet, ad § 4. Instit. de fidejussor. num. 5*; *Berlichius, part. 2. conclus. 24. num. 125*.

17. On the same ground, that a sentence shall the sooner have force through this security, and gain effect, it seems to have resulted that you will find it the received practice in many tribunals that a sentence passed against a defendant can immediately, and without a new suit, be executed against a surety given for the satisfaction of a judgment; for although this does not so obtain with regard to other sureties, yet I think that it is not without reason the approved practice as to a surety for the satisfaction of a judgment, for such a contradiction of such fidejussion cannot seem to be other than vexatious and dilatory after it became manifest after the sentence of the judge delivered against the defendant, what he and what the surety owes; nor are suits to be multiplied without necessity or utility, without any triumph resulting to the surety, who most surely is a debtor. Whence it is that *Anton. Fabr. Cod. libr. 8. tit. 28. defin. 8.*, holding there the opposite view, himself admits that the inquiry is not to be again begun as to the right of the victor—which a new proceeding would be; but that the suit against the surety is to be therefore begun anew lest there be a beginning from execution. How weak this reason is in this case will thence appear that in the said *defin. 8* he himself has laid it down that a surety as to appearing must suffer execution without a fresh suit: *Vide Sande, decis. Frisic. libr. 3. tit. 10, def. 3*; *Christinseus, vol. 2. decis. 145. num. 5*; *Mævius, de arrestis, cap. 22. num. 29 et seqq*; *Groenewegen, ad l. ult. § 1. C. de usuris rei judicati*; *Mysingerus, Rebuffus, Guido Papa, Radelantius*, and others there gathered together. As, however, the surety suffers execution without a fresh suit by virtue of the sentence passed against him, so he has himself recourse against the principal defendant by authority of the same judgment, execution being directed against such defendant without any previous action of mandate, just as if all the right of execution already gained to the victor were transferred to the fidejussor himself: *Rebuffus, ad constit. reg. tom. 1, de literar. oblig. art. 6. gloss. 8. num. 33 et seqq.*; *Mævius, d. cap. 22. num. 33, 34*.

18. The obligation of the surety intervening for satisfaction of judgment ceases, however, whenever the plaintiff, having incorrectly framed the summons, changes it after the security has been interposed, renouncing the instance," according to the custom of the Court, whether he substitutes one action for another, or brings another action, inasmuch as a change having been made, it is clear that there is an adjudicating about another thing than that for which the security was given:

l. cum quærebatur 18, § *ult. ff. judicatum solvi* (D. 46. 7.) *l. non ab judge* 64, § 1, *ff. de judiciis* (D. 5. 1.); *Sande, decis. Frisic. libr. 3. tit. 10. defin. 3.* And the same is to be laid down if the person of the plaintiff or defendant be changed: *l. si ante* 7, *ff. judicatum solvi* (D. 46. 7.) *l. 1, § ult. ff. quib. mod. pign. vel. hypoth. solv.* (D. 20. 6.); since it might happen that any one, being certain that Titius does not owe, or if he does owe, can pay, would readily promise for him that the judgment would be satisfied; but if another person were summoned whose transactions and means he was not so familiar with, he would probably have declined the burden of promising security. Add to which it would be contrary to the principles of law that you should be bound for him for whom you were not surety, or that, being surety, you should be bound to him to whom you did not, as to a stipulator, promise that you would pay: *arg. § si quis alii* 4. *et § alteri* 19. *Inst. de inutil. stipulat.* (I. 3. 19.); for although the law allows any one to acquire an obligation for another by his (the former's) stipulation: *d. § 19 et 20*, and although that is nowadays frequently done, still it is clear that that cannot otherwise take place than if he stipulated with the intention that he would acquire the obligation for another and not for himself, which intention cannot be assumed in the case under consideration.

19. The fidejussorial obligation for satisfaction of a judgment ceases, lastly, if the person of the judge has been changed, when anyone about to proceed before judge Titius has received security and then proceeded before another, for the sureties did not subject themselves to the sentence of this other judge: *l. si quis apud* 3. *in princ. ff. judicatum solvi* (D. 46. 7.) The consequence of which is, that if any one arrested gave, with the view of obtaining relaxation of the arrest, security as to remaining, and at the same time security as to satisfying the judgment, according to the custom of many regions, as before said; and then, through a declinatory exception set up (that this can be done is said in *tit. on Jurisdiction, ante*, Part II.) has been remitted to another judge, say, the judge of the domicile, or a privileged, a military, or an academic, &c., judge, we may say that the fidejussor will be in no way bound for the judgment of another judge without a renewal of the suretyship. But whether he who was surety in the first instance that the judgment would be satisfied, still remains bound for the judgment of the higher judge where an appeal is noted, is matter of doubt. I think the whole point can be made clear by drawing a distinction. For if, in the first instance, the defendant was defeated, and if, on appeal, the higher judge confirmed the sentence of the lower judge, whether wholly or in part, the surety will be undoubtedly bound, in as far as confirmation has followed; because the whole action and obligation of judgment has come rather from the second than the first sentence, and therefore from the act or pronouncement of that judge before whom the security had been interposed. Whence a confirmed sentence can be executed by the lower judge, as will be said in *tit. de re judicata* (Tit. 42. 1. *post*). If, how-

ever, the defendant were absolved in the first suit, and the plaintiff appealing, the superior judge decided against the defendant, Scævola answered in *l. pen. ff. judicatum solvi* (D. 45. 5.), that the surety given in the first suit is not bound as to such judgment; for it is true that the sureties did not subject themselves to the sentence of this appellate judge, which submission was required that the surety might be bound: *d. l. si quis apud 3, ff. judicatum solvi* (D. 46. 5.) And this will be so whether the surety made express mention of the judge, or whether he simply promised to satisfy the judgment. For since the acts of those acting should not operate beyond their intention, and as prætorian stipulations as much as possible receive interpretation from the intention of the prætor imposing them: *l. in prætoris 9, ff. de prætor. stipulat.* (D. 46. 5.); *l. in conventionalibus 52, ff. de verb. oblig.* (D. 50. 16.); and as it is in no way probable that the judge who directed the giving of this security wished to strengthen any other tribunal than his own, much less that he wished to strengthen such a tribunal as that whereby his own tribunal would be overturned and deprived of all strength; it follows, therefore, of itself, that all the force of such a security is comprised within the limits of the first trial, nor can it be extended by the appeal of the plaintiff to the higher judge. Although some hold a different view on this point: *Vid. Dutch Consultations, part. 4. cons. 122. and part. 3. vol. 2. consul. 18. num. 5; and part. 5. consul. 259; Thesaurus, decis. 202; Jacobus Coren, observ. 34. num. 10, 25 et seqq.; Boerius, decis. 315; Christinus, vol. 2. decis. 145. num. 14, 15; Cancerius, var. resol. part. 2. c. 5. num. 91 et seqq.; Fachineus, controvers. libr. 8. cap. 57; Henr. Kinschot, respons. 89; Consult Cabellus, who partly dissents in his resolut. crimin., casu 109.* But to remove all doubt, it is advisable to frame this security so as to cover all, and for the payment of that which shall be adjudged by the final sentence, according to *d. l. pen. ff. judicatum solvi; Petrus Bort, de arrestis, cap. 2. num. 9, 10.*

TITLE IX.

IF THE ACTION BE FOR A NOXAL CAUSE, HOW
SECURITY MUST BE GIVEN.

SUMMARY.

1. Joint owners, usufructuaries, and the like, must give security *in solidum* if the proceeding is a noxal one.
2. (Refers merely to certain results of slavery.)

1. If the proceeding be on a noxal cause, the prætor orders that the slave * (by or to whom the injury was done) shall be produced "in that same cause in which he now is," lest the right of the plaintiff shall be deteriorated. For by mere citation in law the slave is not made "litigious," and therefore may be still sold to a stronger adversary, or to an adversary in another Court, or given up to another punishment (*noxæ*), to the detriment of the plaintiff: *l. 1. pr. et § 1, ff. h. t.* (D. 2. 9.) If there are many owners, and one is summoned in a noxal proceeding, he must give security for the whole, and not for part, as he is bound to defend for the whole. This is also so received as to a usufructuary, *l. si cum usufructuario* 3. *l. 4, ff. h. t.* (D. 2. 9.), for although none of them is forced to defend the slave, provided he is prepared to relinquish the usufruct and property in him, *l. si servus* 8, *ff. de noxalibus action.* (D. 9. 4.), yet if he were unwilling to do so, the necessity was imposed on him of defending as a whole: *d. l. l.*

2. He who, however, manumits a slave after this security interposed, and he appears free, when he was summoned in a noxal proceeding, does not offend against the security, for he does not seem to have made the condition of the adversary worse, but rather better, *l. pen. in fine ff. h. t.* (D. 2. 8.), since to him is thereafter given a direct action against the manumitted slave for the whole penalty, without a noxal surrender: for although after the manumission of slaves they cannot be summoned on their contracts during slavery, yet they remain bound for delicts committed during slavery: *l. servi* 14, *ff. de obligat. et action.* (D. 44. 7.) It would otherwise obtain if (the rest of this title refers purely to results of slavery).

* Though the allusion here is to slave, this title is partly translated as having possible relation to other analogous noxal cause, e.g. dogs doing injury, &c.—*Transl.*

TITLE X.

CONCERNING HIM BY WHOSE ACT IT WAS THAT ANY ONE DID NOT APPEAR IN COURT.

SUMMARY.

1. An action to be proceeded with within a year, is given against him who fraudulently (not negligently) caused a plaintiff or defendant not to appear. This action is for such person's own loss, and the damage for which he is liable to others. Detention by another does not excuse defendant. Action is against him who detained, himself, or by others, and against his heirs, if gainers. If many are so liable, satisfaction by one frees others. *Id quod interest* explained here to mean value of thing itself and damage.
 2. If by non-appearance the action is prescribed, and the causer of the non-appearance were insolvent, the action is equitably restored to the plaintiff, lest defendant gain by another's malicious wrong.
 3. If plaintiff and defendant mutually detain each other by malicious wrong, their offences compensate each other.
 4. The differences are stated between the action under this title and under title VII.
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1. If it occurred through another's malicious wrong (not negligence) that any one did not appear in Court who was bound to make satisfaction, whether he was the plaintiff or the defendant, an action *in factum* [*i.e.*, to meet the particular case—*Transl.*] is given within the year, not only to the plaintiff but to the cited defendant: *l. 1, §§ 1, 2, 3. ult. l. ult. § 2, ff. h. t. (D. 2. 10.)*; because it is both to the interest of the party cited that he shall not be too often called away from other business and from his domestic affairs, from which often he cannot be absent without loss, and also because he is bound to the party citing him in a penalty or *id quod interest*, on account of his non-appearance: since on account of detention made by a private person, a defendant is not excused: *l. 2, § ult. ff. si quis caution. in jud. sist. caus. fact. (D. 2. 11.)* This action lies against him who fraudulently did this, whether by himself or by another, whether by keeping back or announcing anything too harshly: *d. l. 1, §§ 1, 2, ff. h. t. (D. 2. X.)*; and also lies against his heirs, in so far as the action passed to them: *d. l. 1, § ult. ff. h. t. (D. 2, 10.)* And for "*id quod interest*": *l. ult. pr. ff. h. t.* Whence if many have so acted *in fraud*, the

others are freed by the giving of one: for the plaintiff, by demanding "*id quod interest*," rather seeks the reparation of damage than a penalty: *l. 1, § si plures, 4, ff. h. t.*; although in what is "*id quod interest*" may then be included the value itself of the thing prayed, when the defendant, in the delay, has acquired the dominium of the thing prayed, or is freed from the action: *l. ult. pr. et § ult. ff. h. t.*

2. If, however, the third party by whose malicious wrong the defendant did not appear, is not solvent, and the action is meanwhile extinguished by prescription, a restitutory action lies for the plaintiff against the defendant: that is, the action which had vanished by the lapse of time is equitably restored: lest the defendant should reap advantage by another's malicious wrong, and the plaintiff should sustain damage: *l. ult. § plane 1, ff. h. t.*

3. But if the plaintiff has not appeared by the malicious wrong of the defendant, and the defendant by that of the plaintiff, malicious wrong is compensated with malicious wrong: *l. ult. et pen. ff. h. t.*; for as the proceeding here is only for the reparation of a private wrong, and to give *id quod interest* to injured persons, it is received practice that the offences can be removed by compensation: *l. viro 39, ff. soluto matrimo.* (D. 24. 3.) If the defendant only is impeded by the malicious wrong of the plaintiff, then the plaintiff is not bound to the defendant by this edict; for it will suffice that the defendant opposes an exception to the plaintiff when the plaintiff proceeds for a penalty: *l. 1, § si reus 3, ff. h. t.*

4. The action referred to in this title differs, however, from that which is referred to in the seventh title. For here it is malicious injury which is restrained—there it is violence. Here the plaintiff and defendant can proceed—there only the plaintiff. Here the action takes place whether it was the defendant who did not come, or whether the plaintiff did not—there only if the defendant did not come. Here "*id quod interest*" is sought—there a mere penalty. Here, when one pays the others are released; but not so there. Lastly, here he himself who is impeded can proceed, provided only he is impeded by a stranger: *Add. Cujacius libr. 10. observ. 10.*

TITLE XI.

HOW IF ANY ONE WHO HAS GIVEN SECURITIES TO
REMAIN IN COURT, HAS NOT OBEYED THEM.

SUMMARY.

1. He who, after security given, does not appear, is said to desert his suretyship or recognizance (*vadimonium*). This even if he think the action prescribed, but there is some doubt as to it. Those under age, or in curatorship, who cannot be said to give security, can neither be said to *desert* it, for there never was a good security.
2. When the suretyship was thus deserted, the plaintiff could not by the older Roman law immediately pray definitive sentence, he could only be "put in possession." If defendant had been thrice edictally sued, then by the law after Leo's time he would get judgment against him after a year. The surety and the defendant were liable in an action for the penalty if fixed, or the *id quod interest*, if unfixed, the latter being valued at the time fixed for the appearance; for there being a particular time of appearance fixed, the general rule does not here apply, viz., that in equitable suits the time of judgment is taken as the time of valuation, when no special time is fixed, and the time of contestation of suit in strictly legal suits. If any one has promised *two* shall appear, he is not, as to the penalty fixed, liberated by the appearance of *one*: yet, by opposing the exception *doli mali*, to the strict demand for the whole, he is let off with half the fixed penalty. But where no penalty is fixed, then, in the recovery of the *id quod interest* the demand is proportionally less, just as is the case in securities for rathabition, where part is satisfied. The surety is not immediately liable but has certain extensions of time to pay granted to him, equal to the periods originally fixed, but not more than six months. If the defendant then still appears, and the suit is finished, the suretyship is satisfied.
3. The exaction of the penalty or *id quod interest*, ceases by compromise, condemnation to death before appearance, or death if not caused by the surety. If death is after appearance, surety remains bound for penalty, where the action is such an one as passes to and against heirs. Generally actions on stipulation do so pass, but there is, e.g., the exceptional action of "injury," which does not pass against heirs unless the suit were contested before death of plaintiff or defendant. In such a case the surety for appearance is likewise discharged if there have been no contestation of suit, unless such a time had elapsed that the defendant since deceased, could have contested on appointed day.
4. It also ceases if the pupil for whose appearance a tutor was surety, died, or became major, or obtained from an inheritance by whose adiation he would be bound. Or if defendant does appear afterwards, before plaintiff's right is made worse.

In *voluntary* penal stipulations benefit of receiver is not studied, and fine is even given to him whose benefit it is not, and subsequent tender of what is due does not help when due date is passed. But in magisterial penal stipulations, the magistrate exercises a discretion.

5. It also causes if defendant be, without his own fault, impeded from appearing, and alleging just cause, promises to come when the impediment ceases. Some of these just causes enumerated in the text: (a.) Municipal duty; (b.) Evidence in Court; (c.) Illhealth; (d.) Madness; (e.) Tempest; (f.) River; (g.) Order of magistrate; (h.) Family funeral; (i.) State service. Provided there were no renunciation, malice, negligence. But detention by private person does not excuse from condemnation in damage, which must then be recovered from the detainer.
6. The preceding has reference to Roman law. Voet now discusses modern law. There is such a variety of judicial proceedings and regulations according to the custom of various countries and Courts, that he does not profess to be exhaustively accurate, but only to try to lay down certain universal principles he thinks are adopted by common consent. And first as to defendant's delay. Contumacy only follows on three proper citations, with the legal intervals. On the first, declinatory exceptions cease, on the second dilatory, on the third peremptory. The fourth citation is for final summons, examination of documents of debt, witnesses, &c. Penalties of contumacy follow whether he is defeated or absolved. If plaintiff makes default, condemned in costs. If the defendant appears on the fourth citation, he can still defend his case.
7. Three-fold citation unnecessary in some cases: cases mentioned in the text where one or two citations will suffice.
8. Plaintiff not proceeding, defendant prays absolution and costs: which plaintiff must pay before proceeding anew. If the non-procedure is on appeal, respondent prays "deserted appeal." Plaintiff then debarred from resummoning. If defendant, however, does not want absolution, after three edicts and a year, he claims conclusion of suit. Plaintiff sometimes cited to institute action or submit to perpetual silence.
9. Non-appearance personally, or by attorney, is not "contumacy," but the default may be purged for just cause, *e.g.*, bad health, higher duties. This purging is, on payment of costs, easier where the non-appearance is in subsequent stages of the case and before sentence. After sentence it is very difficult, only on solemn restitution and for the justest causes.
10. If there is at first non-appearance, but soon an appearance while the judge is yet on the Bench, it is excused, and case proceeds.
11. He who does appear but does nothing is also a defaulter, *e.g.*, plaintiff not praying or defendant not answering, where bound so to do. He who being called does not answer is "contumacious."
12. He is not contumacious who appears, but cannot do the act for which he is summoned on account of its already having been elsewhere done. Nor he whose adversary did not either appear. Contumacy must be specially prayed. Judge will not grant of his own accord.
13. Nor he who did not come to an incompetent judge, who has no jurisdiction by the common law. But if the non-jurisdiction is based on a special privilege, the person claiming the privilege must appear and plead it: otherwise he is contumacious. Thus you must draw a distinction between cases of common law, non-jurisdiction, and privileged non-jurisdiction. Pragmatics urge that defendant purging default may still plead declinatory exception in former, but not latter class of cases.
14. Nor a defendant who appears earlier, by "anticipation" allowed him, *e.g.*, in cases of personal or real arrest, or penal mandate.

1. He who, having given security as to appearance, does not appear, is said to desert his recognizance (as to which word "*vadimonium*," or suretyship, recognizance, see *Budæus*, very fully, *ad Pand. ad l. 2, ff. de orig. juris fol. 21, 22.*; *Rævardus, ad leg. 12. tab. cap. 5. pag. 29 et seqq.*), even if he think himself liberated by lapse of time and prescription from the action, one limited as to time, in which he is summonsed, provided only if the point be in some measure dubious, and needing further inquiry: *l. si eum 10. in princ. ff. h. t. (D. 2. 11.)* If, however, the security as to appearing has been given by those who could not bring an action, and who, therefore, had no legal capacity to appear in Court (such as those under age, minors, and the like, without curators), and these did not then appear, they cannot be said to have deserted their suretyship, since the security is wholly null and void: *l. fidejussor 2, § si quis 1, ff. qui satisd. cog. (D. 2. 8.)*

2. When, however, the suretyship is deserted by the defendant, the plaintiff does not seem to have been formerly able to obtain definitive sentence against the absent defendant, since the suit was not yet contested. For although, when the plaintiff was absent and had been cited by three edicts, the defendant could pray, after a year, that the cause should be inquired into and decided in the absence of the plaintiff: *nov. 112. C. omnem vero 3*; this was nowhere allowed by Justinian to the plaintiff, whose case was in many respects on a worse footing than that of the defendant; it was first allowed by Leo: *Novell. Leon. 108*. It was more the custom, therefore, by the law of Justinian, that in such a case the plaintiff was only "put in possession" of the goods of the defendant by the prætor: *Novell. 53. cap. si vero semel 4. l. prætor ait 2, ff. quibus ex causis in possess. eatur. (D. 42. 4.)* And the defendant himself, and the surety given by him as to appearing, is farther bound by the *condictio certi*, if a certain penalty were promised: or, if the addition of the penalty were omitted, then for "*id quod interest*," the valuation of the thing being made as at the time when the defendant ought to have appeared, even if at the time at which the action for "*id quod interest*" is instituted, it had ceased to be of interest to the plaintiff: *l. qui autem 12, § 1, ff. h. t. (D. 2. 11.) l. ult. ff. si quis in jus vocat. non iverit (D. 2. 5.) l. fidejussor 2, § ult. ff. qui satisd. cog. (D. 2. 8.)* For although the rule is found laid down as to valuation, that in equitable suits the time of the judgment is to be regarded, but in strictly legal suits the time of contestation of the suit: *l. sed mihi 3, § in hac 2, ff. commodati (D. 13. 6.)*, yet since that has only place whenever no addition of time is made, as we will show in our *tit. de condict. triticariâ (D. 13. 3.)*, it has no application to the present question, where a certain time of appearance is expressed. And if anyone has promised that two shall appear, he is not liberated by one appearing: *l. ult. ff. in jus vocati ut eant aut satis vel caut. dent (D. 2. 6.)*: and although in strict law he is bound in such case for the full penalty, because it is true that the fulfilment of the promised act has not followed, arg. *§ ult. Inst. de verbor. obligat. (I. 3. 15) l. stipu-*

latio ista 38, § *alteri* 17. *in fin. ff. de verb. oblig.* (D. 45. 1.) yet by opposing the exception *doli mali*, he only gives half the penalty: *l. si servus* 9, § 1, *ff. h. t.* (D. 2. 11): it would be otherwise if no penalty were affixed; and if, therefore, the action were only brought for *id quod interest*: for then the condemnation is to be made for proportionally so much less as it was proportionally as much less that only one appeared: in the same way as it has been received with regard to the security as to ratifying, when the ratification has only followed as to part: *l. si procurator* 18, *ff. ratam rem haberi* (D. 46. 8.) By the new law the surety is not immediately, on the lapse of the day fixed, compelled to pay the penalty or *id quod interest*, but certain other *induciss* or extended periods of appearance are allowed him, similar to the former ones, not however longer than six months, within which, if he causes the defendant to appear, he will seem to have satisfied his suretyship: in the same way in which he also satisfied it if he wished to undertake the defence of the defendant appearing, after the lapse of the first time granted, yet before the ending of the resought *induciss*; and brought the defence to an end: *l. sancimus* 26. *C. de fidejussoribus et mandator* (C. 8. 41); *Ant. Matthæus de criminibus libr. 48. tit. 14. cap. 2. num. 18.*

3. The exaction of a penalty or of *id quod interest*, ceases if the suit is meanwhile settled by transaction, *l. non exigimus* 2. *in princ. ff. h. t.* (D. 2. 11.), or if the defendant has, before the day of appearance, been condemned to death or exile: *l. si decesserit* 4, *ff. qui satisd. cog.* (D. 2. 8.); *l. sed et vi* 4. *pr. et* § 1, *ff. h. t.* (D. 2. 11); or if he is dead, unless he died by the malicious injury of the promissor: *l. si decesserit* 4, *ff. qui satisd. cog.* (D. 2. 8.); *l. si eum* 10, § *tomo* 1, *ff. h. t.* (D. 2. 11.) If he die after the day of appearance, the fidejussor remains bound by the stipulation already of effect, and can be equitably summoned, *d. l. si decesserit* 4, *ff. qui satisd. cog. l. sancimus* 26. *C. de fidejuss.* (C. 8. 41), unless the principal action be such an one that it does not pass against the heirs of the defendant, but is extinguished by his death: for although as a rule actions based on stipulations, when once accrued, pass to heirs, and are continued against heirs; yet if in an action of injury (which, if the suit be not yet contested, vanishes by the death of the plaintiff or defendant) a surety has given security as to appearance before the suit was contested, and the day of appearance having passed, the plaintiff or defendant dies before contestation of suit, the surety is no longer bound, unless the defendant, who was to appear, survived so long after the lapse of the day of appearance that, if he had come on the day appointed, the suit could have been thereafter contested with him: *l. si eum* 10, § *qui injuriarum* 2, *ff. h. t.*

4. It ceases also if, when a tutor, summoned in the name of his pupil, had given security as to appearing, the pupil himself had died, or become a major, or had abstained from the inheritance by the adiation of which he was bound, even after delay made: *l. ult. ff. h. t. junct. l. tutor pro pupillo* 28, *ff. de administr. et pericul. tut.* (D. 26. 7.) It is the same if

the defendant came, not at the appointed time, but afterwards, when the right of the plaintiff was not as yet made worse by the delay: *l. et si post*, 8, *ff. h. t.* (D. 2. 11.); for although in penal stipulations, entered into by the free will of the contracting parties, without the authority of the prætor, it commonly obtains that it is not inquired whether "it is of advantage" or not, and the recovery of the fine is also given to him whose advantage it was not at all: *l. stipulatio ista* 38, *et alteri* 17, *in med. ff. de verbor. obligat.* (D. 45. 1.); and although, as a rule, delay is not purged by subsequent tender when once, on account of the day added to the obligation, and delay made in payment, a right to the penalty had been acquired: *l. trajectitiæ* 23, *ff. de obligat. et ait* (D. 44. 7.); *l. Celsus*, *ait* 23, *et l. 24, ff. de recept. qui arbit. recep.* (D. 4. 8.); yet it is otherwise received as to those stipulations which are interposed by order of the magistrate; for as the prætor orders them to be made, so he interprets and regulates them equitably when made in his jurisdiction: *arg. l. 1, § pen. et ult. ff. de prætorii stipulat.* (D. 46. 5.); *l. in conventionalibus* 52, *ff. de verbor. oblig.* (D. 45. 1.), joined to *l. si fidejussor* 7, § 1, *ff. qui satisd. cog.* (D. 2. 8.).

5. Especially, however, does the penalty cease, or the exaction of *id quod interest*, whenever, without his fault, the defendant could not come on the appointed day, and alleged a just cause of impediment: provided he only declare that he is ready to come when the impediment ceases, *Arg. l. quid tamen*. 21. § *si quis ex* 9 *ff. de recept. qui arbit. recep.* (D. 4. 8.). For a litigator was not wholly freed, on account of an intervening lawful impediment, from the cognizance of the judge, but rather, by the precepts of the laws of the twelve tables, was the day of trial postponed: *l. 2. § si quis judicio* 3, *ff. h. t.* (D. 2. 11.). *Rævardus, ad leg. 12, tabul. cap. 5. pag. mihi.* 24 *et* 25. The following are mostly named as just causes of non-appearance: if any one were impeded by the necessity of discharging municipal duty, or of giving evidence in Court, or by ill-health, or madness, or tempest, or the force of a river, or public detention caused by the act of the magistrate, or by a family funeral, or by absence for the sake of the state, and other like reasons: *l. non exigimus* 2, § 1. *et seqq. usque ad finem l. sed et si* 4, § 1. *in fine* § 2, 3. *l. si is, qui* 6, *ff. h. t.* Provided there was no special renunciation in certain causes, *d. l. sed et si* 4, § *quæsitum* 4, *ff. h. t.* (D. 2. 11.), and that these causes are not feigned in malice, and that no manifest negligence or blame of the defendant appear in respect of these causes: in which cases there is place for the discretion of the judge, as Ulpian shews in many cases in *d. l. non exigimus* 2, § *si quis tamen* 8 *et* 9, *ff. h. t.* (D. 2. 11.). This must be observed, that it is not a sufficient cause of excuse if any one has been detained by a private person: in which case if he has sustained damage on account of deserted suretyship, he will have recourse against the detainer for *d. quod interest id. l. 2, § ult. in fisc l. 3, ff. h. t.*

6. So far as regards the precepts of the Roman law. And although nowadays, for just as many tribunals as there are, so are there also as

many diverse and varying styles of legal proceedings in various countries, and necessities differently imposed on the plaintiff and defendant, of appearing and of observing times of appearance, and penalties of negligence, delay, or contumacy:—to follow out which, singly, or discuss them accurately, is neither my intention, nor, if it were, could I, or any one do so, unless he had an inordinate opinion of himself:—yet as you cannot deny this, that certain universal principles may be laid down as to the duties of plaintiffs, and defendants, their delay and contumacy, principles approved by the consent of many peoples and tribunals,—it will be worth while as briefly as possible to enumerate them, adding those points which may be regarded as controverted. As regards the defendant, who is more frequently a delayer than the plaintiff, he only as a rule is held to be contumacious who, after three citations, with the interval of time between which is legal according to judicial custom, does not obey the judge, and appear: he is deprived of all declinatory exceptions after the first unbeyed citation: of all dilatory ones after the second; and of all peremptory exceptions after the third; and he is cited for the fourth time that he may see the summons of petition issued against him, and the instruments of proof, and that witnesses be produced, so that, if he can, he weaken the proofs of the plaintiff, and also, if the plaintiff pray it, respond to the interrogations, on taking the oath of calumny wherever it is the custom still to do so. Nor does it matter whether he is summoned in a real, or personal, or a mixed action. And he is to be condemned in the penalty of contumacy whether he be defeated, or whether he be absolved, as the plaintiff who made default in proof is condemned in the expenses: *Vide Instruct. Cur. Holland, art. 108, 109, 110. And of the Ultrajectine Court, tit. van defaulten van gedaagde art. 1, 2, 3, 4, 6. Of Brabant, cap. 18. art. 561, 562. Of Flanders, art. 268, 269, 270, 271, 272. Ordonnantie op de justitie in de Steden en ten platten lande van Holland, 1 April, 1580, art. 3, 4, 5; Wassenaer, pract. jud. cap. 4. num. 53 et seqq.; Sim. van Leeuwen, paratitla jur. noviss. libr. 2. part 1. cap. 9.* But although he who is cited for the fourth time is not, according to strictness, and to the words of the various instructions, admitted to defend himself, yet by inveterate custom it has obtained, that, when he appears on the fourth day of citation, he is still permitted to make his defence: and this is also laid down in the laws of some tribunals: *Instruct. Curis Ultraject. tit. van defaulten van den gedaagade art. 4; Of the Court of Flanders, art. 271; Wassenaer, pract. jud. cap. 4. num. 56; Sim. van Leeuwen, paratit. jur. noviss. libr. 2. part 1. cap. 9. num. 1. versu den gedaagade; Ant. Faber Cod. libr. 3. tit. 10. defin 1.*

7. There are many matters, however, for which a threefold citation is unnecessary; and one only, or two, will suffice. It is received practice that one will suffice for the purpose of depriving any one, who, being able, does not pay, of the declinatory exception; or that it be admitted when the plaintiff makes default:—or that an obtained benefit of cession be confirmed, or a new execution decreed of a sentence not handed over for

execution within the time fixed by the custom of any tribunal, a sentence thus prescribed : or that the power of diminishing expenses prayed, be denied : or that execution which had been appealed from should proceed ; or that one cited to answer to interrogatories, with the oath of calumny, should be taken to have confessed : or that sworn witnesses should be examined : that copies compared with the originals should be confirmed : that there should be an ocular inspection ; and many other instances. Yet in many cases the citation is to be repeated, if the first have only been served at the house, but no " insinuation " made on the adversary himself. Two citations are required that heirs may continue the litigation of the suit : that a chirograph may be acknowledged, and that fiduciary payment may be fully decreed : also in regard to an interposed appeal, and a prayed " reformation " (review of sentence) : that sentence may be passed in the case of him who, when first called, declares himself unwilling to come to the trial, or, having prayed a postponement in answering, made default on the appointed day in cases of defrauded public taxes ; and in many other cases recited in the instruct : *Cur. Holl. art. 113, 114, 115, 118, 119, 178, 223 : Instruct. Curiss Supr. art. 187, 188, 206, 211, 214, 228, 229, 231, 237, 242, 244, 247, 248 : Of the Court of Utrecht. tit. van defaulten van de gedaagde art. 5 et seqq. usque ad fin. tituli : Of the Court of Brabant, cap. 18 ; art. 541. et seqq. ad art. 561. and art. 563 ; Of the Court of Flanders, art. 273. et seqq. ad art. 282 ; Ordonnantie op 't Stu'ck van de justitie in de Steden en ten platten lande van ; Holland ann. 1580. art. 6, 7, 8, reglement op 't procedere voor de gecommiteerde Raaden van Holland 22 Januar. anni 1660. art. 8 et seqq. Instruct. van den Raad van Staten in saken van de gemeene mid-deten 5 Martii 1656. art. 4, 5, 6, 13, 14.*

8. If the plaintiff does not proceed at the appointed time, the defendant prays that he may be absolved from the instance, or that the edict may be cancelled and the plaintiff condemned in the expenses, and not again heard in the same cause unless on payment of the actual expenses : *l. et post 73, § 1. 2. ff. de judiciis (D. 5. 1.)* : or if the case has been carried to a higher judge in appeal, the defendant prays the appeal may be declared deserted : which being done, he cannot be again summoned by the plaintiff in the same cause : *l. ult. § Mud. etiam 4. C. de temporib. et reparat. appellation. (C. 7. 63.) ; Instruct. Cur. Hol. art. 111, 114 ; Ordonnant op de Justitie in de Steden en ten platten lande van Holland. anno 1580. art. 2 ; Instruct. Suprem. Curiss art. 225 ; Curiss Ultrajectinss tit. van defaulten van den eyscher art. 1 ; Flandricss art. 266. Brabantinss cap. 17. art. 517, 518 ;* where, also, in the following articles of the Instructions of the Court of Utrecht and Brabant, cap. 17, it is laid down what ought to obtain in many other special cases where the plaintiff makes default. If the defendant, however, when the plaintiff makes default, does not wish to be absolved from the instance, he may, on the plaintiff being cited by three edicts, with an interval of thirty days, and delaying to proceed for a whole year, pray and obtain that the principal suit may be

finished on its allegations and proofs: *nov. 112. cap. omnem* 3. And among the Ultrajectines, this rule of the Roman law is approved in many cases, the liberty being given to the defendant of citing the defaulting plaintiff, that he institute the action or otherwise that perpetual silence be imposed on him: *Instruct. Cur. Ultraject. tit. van defaulten van den eyscher art. 1*; concerning which I have also more fully treated in tit. on Jurisdiction. (See Part II. of this translation.)

9. According to what has been laid down specially, and in passing, and to be sought more fully from the fountains themselves of the law, it must be taken, in the first place, that he is not to be so rightly regarded as "contumacious," who neither came himself at the appointed time, nor appointed an attorney; but that a purging of the contumacy is admitted when he alleges, and proves, just causes of impediment and absence: according to *l. 2, § 1, et seqq. ff. h. t. (D. 2. 11.) l. quæsitum 60. ff. de re judicata (D. 42. 1.) l. pen. C. quo modo et quando iudex sentent. proferre debeat, (C. 7. 48.)*: for he does not suffer the pain of contumacy whom adverse health or occupation of a higher nature defends: *l. contumacia 58, § pœnam 2, ff. de re judic. (D. 42. 1.)*. For which purging there is, on the payment of costs, an easier opportunity given when either litigant, after he has begun to appear in the suit, is a delayer in this or that part of the trial, and definitive sentence has not yet been pronounced: according to *Instruct. Cur. Holl. art. 122, 125*, there being, however, sometimes need of special restitution: see *Wassenaer, pract. judic. cap. 5*: but after definitive sentence passed it is far more difficult: and is not to be granted except on solemn intermediate restitution, and for the justest causes; concerning which *tit. ex quibus causis majores (post, pp. 4, 6)*.

10. If, however, one who ought to come, does not appear, and thus, on the prayer of his adversary, is declared in default, but presently appears, the judge being still on the bench, and is ready to make answer or to do what else is to be done, there is no need of purgation. For although (as was laid down by the Emperor Antoninus) nothing is lightly to be altered of the solemnities, yet when evident equity demands, relief must be given: and therefore if any one cited does not respond, and is on that account pronounced to be in delay, but immediately comes before the sitting on the tribunal, it may be thought not to be his fault, but that he was away on account of the voice of the crier not being sufficiently heard: *l. pen. ff. de in integr. restitut. (D. 4. 1.)*, and there *Gothofredus in notis* and *Groenewegen ad d. l. pen.*

11. Not only is he, however, to be considered a delayer and defaulter who does not come at all on the appointed day, but he also who came but did not perform that act for the performance of which the day was appointed: as for instance if the plaintiff who appeared did not pray anything, or if the defendant did not contradict the plaintiff's petition when he ought to do so: for he is always considered in the light of an absent person who, when present, does not defend, and seems to do nothing; but he is expressly said to be "contumacious," who, when

called does not answer: *l. non defendere* 52, *ff. de reg. juris* (D. 50. 17.) arg. *l. ait prætor* 23. *pr. et § ult. ff. ex quibus causis majores* (D. 4. 6.); *l. ætate* 11, § *qui tacuit* 4, § *nihil* 7, *ff. de interrogat. in jure faciendo* (D. 11. 1.); *Carpzovius, defin. forens. part 1. constit. 10, defin. 12 et 16.*

12. But on the contrary he is not to be considered "contumacious," nor does he suffer the penalties of contumacy or delay, who, when cited to celebrate any act on a certain day, hour, and place, did all he could; since, in the meantime, that act had been done at another time, or in another place, arg. *l. si ut proponis* 4. *l. 5. C. quomodo et quando judex sent. proferre deb.* (C. 7. 43.) *l. cum sententiam* 6. *C. de sentent. et interlocut. omn. jud.* (C. 7. 45.) Nor he who did not appear when neither did his adversary appear, but, rather by a compensation of absence neither is regarded as delayer: for contumacy is not induced *ipso jure*, but only when the adversary demands it on account of the absence of the opposite party, and when the judge decrees it, for the judge is not wont, unless asked, to interpose his offices: *l. properandum* 13, § *et si quidem* 2. *verbo parte fugiente ex una parte actoris absentiam accusante C. de judiciis* (C. 3. 1.), joined to *l. dies* 4, § *hoc autem* 8, *ff. de damno infect.* (D. 39. 2.); *Christinæus ad Leg. Mechliniens. tit. 1. art. 21. num. 6; Rebuffus, ad constitut. reg. tom. 1. de literar. obligation. art. 6. gloss. 5. num. 5; Simon van Leeuwen, cens. for. part 2., libr. 1. cap. 25. num. 13.* and compare with him the argument of *Tyraquellus, ad l. si unquam verbo revertatur num. 20 et seqq.; C. de revoc. don.* (C. 8. 56.)

13. In the same way he is not regarded as contumacious who did not come when he was cited to an incompetent judge. For only those seem to be contumacious, who, when they ought to obey, do not do so: that is who belong to the jurisdiction of the judge before whom they do not appear: *l. contumacia* 53, § *ult. ff. de re jud.* (D. 42. 1.). Which, however, must be restricted, it seems, to those judges who are incompetent according to the common law, in respect of territory, or because they are specially appointed to decide in certain special kinds of cases: for concerning these it is true that any one laying down the law beyond his territory may be disobeyed with impunity: *l. ult. ff. de jurisdictione* (D. 2. 1.) (*ante p. 295 of this translation.*) And if any one who only enjoys a privilege of prescription of the forum, is within a territory and bound to obey the judge unless he enjoyed the right of a privileged Court: he will not be free from contumacy unless he comes and alleges his privilege, so that thus the judge may estimate whether he has jurisdiction: *l. si quis ex aliena* 5, *ff. de judiciis* (D. 5. 1.) And to this class of cases must be restricted what is above generally laid down, that a defendant cited the first time, and making default on the appointed day, is, on the plaintiff's prayer, deprived of all declinatory exceptions. For if the judge be incompetent by common law, so that he could neither become competent by the express or tacit prorogation of parties, nothing is of force which is done before him, so that not even a sentence passed as against a contumacious defendant has the force of *res judicata*, as I have

already said in *tit. de jurisdictione* (*ante* 2, 1, Part II. of this translation, p. 175). Hence the pragmatics say that if the defendant was in default after the first or second citation, and afterwards wish to purge his delay, he will be permitted to allege an exception declinatory of the forum competent to him by the common law, but not that which is conceded to him by a privilege: *Ant. Faber, Cod. libr. 3. tit. 12. defin. 3 and 4; Rebuffus ad constitut. regius tom. 8 tract. de contumaciâ art. 8. gloss. 1. num. 8; Mynsingerus, cent. 6. observ. 7; Johan. Papon. libr. 7. tit. 7. arrest. 30.*

14. Lastly, neither is he to be considered contumacious who, on a later day being fixed by the plaintiff, prayed, for just cause, and was allowed to proceed with his case on an earlier day, and therefore quicker, and who did appear on the earlier day. Which request of defendant's is considered just when they or their goods are detained by arrest, or where by penal mandates the power of dealing with their goods at discretion is denied them until a question of law is decided: so that in this way the chain of arrest may be so much the more quickly relaxed, or the penal mandate cancelled: *Nader ampliatie van de instructie van den Hoogen Rade 24 Martii 1644, art. 26. vol. 2. placit. pag. 784.*

15. It will be sufficient to avoid the penalty of contumacy or delay, that any one appoint an attorney, and therefore, appearing through him, obeys the judge; nor is it necessary that in civil cases he himself shall satisfy; although in criminal cases being summoned to appear *himself*, he cannot discharge himself by sending an attorney, but, if he should make default, he is to be rather seized and imprisoned on decree. And although in civil cases it very rarely obtains that a defendant is forced by the authority of the judge that he shall present *himself* to the judge, yet if the judge, for a cause, has so commanded, he must be obeyed, lest otherwise apprehension shall be decreed for such delay, which delay is, in civil proceedings, required to occur twice: and this decree of apprehension is not so much granted on account of the quality or the gravity of the civil case itself, but rather because the party ought not to have contemned or spurned the authority of him who lays down the law, but ought to have obeyed him in every way: *arg. l. unic. in pr. ff. si quis decenti non obtemperaverit l. ex quacunque 2. pr. et § 1, ff. si quis in jus vocat. non iverit (D. 2. 5.); Anton. Faber, Cod. libr. 2. tit. 2. defin. 10, 11.* Still it is the duty of a careful and circumspect judge not easily to grant in civil cases, nay even not in criminal cases, whether the petitioners be private persons or accusers armed with public authority, this "citation in person," as it is commonly called; for it is frequently more sought for the sake of extorting money, than of seriously prosecuting a crime, as is prudently observed in the *Dutch consult. part 5. consil. 34, p. 122, in med.*

TITLE XII.

OF HOLIDAYS AND POSTPONEMENTS AND DIFFERENT PERIODS OF TIME FIXED.

SUMMARY.

1. Legal holidays are the days on which the Courts are closed, and no judicial business done.
2. Holidays are (a) "solemn," i.e., fixed, and "sudden," or specially declared by the Princeps at irregular times; (b) divine and "human." The chief divine holiday is Sunday. The Roman Code commended its exact observance. On it no Roman judge or arbitrator could sit. Agriculturists could exceptionally cultivate, not to lose Nature's bounty. Cases could be settled by compromise, for peace-sake. Contracts not null, though reprobated. Criminals may be followed and real or personal arrests made, if urgent. Sentences passed on Sunday, not null, according to Groenewegen. But Voet thinks they are.
3. Citation made on a Sunday, to appear on a week-day, Voet thinks (differing from Gayl) to be null. Sunday is a day of rest and not of criers and executions. Unless there is danger in delay. To disobey such a summons is not contumacy.
4. But citation on a non-holiday to appear on a Sunday, though null for that day, requires appearance on the first following Court day: otherwise he is "contumacious."
5. "Human" holidays are those for man's advantage: e.g., harvest and vintage holidays, &c.
6. No one is forced to litigate on such days, but if he renounces his right, actions may be heard by consent, with ratification. But not if there is dissent or ignorance. Voet is clear as to this, notwithstanding certain dissentient authorities.
7. There can be citation on a human holiday to appear on a day *not* a holiday. And on such holidays matters of great public importance can also be done, and matters not brooking delay.
8. The Princeps, only, declares holidays, not an administrator or judge. Magistrates may regulate times of proclaimed holidays. The Princeps, only, abolishes holidays. But long contrary custom, properly founded, also abolishes: as per p. 55, *ante*.
9. Where holidays vary, those of the place of trial to be observed. Jews had certain privileges on their feast-days by Roman law.
10. Postponements or dilations form the second branch of this title. They are the delayings of judicial proceedings till further periods, the judge's office being meanwhile quiescent. They must not be confounded with "holidays," for they (the former) do not apply to all persons, do not cause Court-cessation, do not apply to litigants, but to payers. Holidays apply to all.
11. Dilations are *I. legal*, which are again divided into 1. before suit contested, as

- (a) twenty days of deliberation granted to a cited defendant; (b) two months to plaintiff for contestation; 2. after suit contested for proofs; 3. after sentence, e.g., ten days for appeal, four months for execution. II. *discretionary*, at judge's discretion, as (a) where thing to be restored, on judgment, is elsewhere situated; (b) where surety wishes to arrest and excuss absent principal defendant; (c) where usufructuary wants to protect owner; (d) where those on military service cannot come to proceed or defend.
12. The Commentators say that *legal* dilations are peremptory and cannot be renewed, whereas *discretionary* can. But Voet thinks even legal dilations can be renewed on necessity. In civil cases as a rule there is only one "dilation," but judge may grant more. In criminal cases there are more; but Voet thinks even one may be refused if the object is to delay justice.
13. It is more doubtful if a judge can *restrict* the time of dilation in a civil case. Voet thinks he can for grave cause. Thus appeals may sometimes even be narrowed within the fixed time. See *post*, bk. 49. tit. 1.
14. Holidays are reckoned consecutively. If so many days are granted for dilation, the day of the order is not included. If three days given, can appear on the fourth. If two months are given, appear on the sixty-first day. Unless leave or custom the first day *must* be included, or if the computation of time must be "from moment to moment." If a thing must be done "*within eight days*" you have the whole of the eighth day: unless the computation there also must expressly be "from moment to moment."
15. For periods of finishing civil and criminal trials, see *post*, bk. 5. 1.

1. THE "holidays" of the Jurisconsult are days free from judicial acts: therefore called "*dies nefasti*," because on them the prætor was not wont to pronounce the three solemn words (*do, dico, addico*), or to lay down the law, so that on those days there was a justicial silence and a closing of the Court, or suspension of law. And hereto appertain the many things gathered from the "antiquities" with regard to the nature, times, and distinctions of holidays by *Jul. Polletus historia fori Romani*, libr. 1. cap. 8; *Rasvardus 5. varior. cap. 19*; *Rosinus, antiquit. Romanar. libr. 4. cap. 3*.

2. According to our law they are rightly divided into "solemn," which return at stated times, and "sudden," which are extraordinarily announced for various causes at the discretion of the judge, and cannot be foreseen: *l. sive pars 3. C. de dilation. (C. 3. 11.) l. sed et si 26, § si feriæ 7, ff. ex quib. causis majoris (D. 4. 6.)* But especially into "divine" and "human." "Divine" holidays are those which are appointed on account of divine worship and devoted to the highest Majesty, chief among which is the Sunday, the exact observance of which is commended by the Code: *l. ult. C. h. t. (C. 3. 12.)*; and its rest from labour, its ease not to be spent in obscene pleasures nor on the theatric scene, nor on the contests of the circus, nor in the sad wild beast sights, but in piety, penitence, or reflection; so that if the celebrating solemnities of the Princeps' birthday fall on that day they were ordered to be postponed. It is in accordance herewith that that day was considered unsuitable for trials, whether by judges or by arbitrators agreed on, the horrid voice of the crier being then silent, and litigants breathing free from controversy:

l. quadringta 6. *l. omnes* 7. *d. l. ult. C. h. t.* (C. 3. 12.) But to those living in the country it was conceded that they could freely and lawfully attend to the culture of their fields, lest the advantage granted by heavenly providence should be lost, whenever it seemed that grain could not be suitably sown in the furrows on any other day, and vines in the trenches: *l. omnes judices* 3. *C. h. t.* (C. 3. 12.) Nor was it forbidden to make compromises for the restoration of concord: *d. l. ult. C. h. t.*; nor to emancipate or manumit: *l. actus* 8. *C. h. t.*; nor was a contract void because it was proved to have been celebrated on a Sunday, for although the contracting parties sin, yet it is true that there are many things which are prohibited to be done, and yet when done hold good: *Dutch Cons. part 4. consil.* 75; *Augustin. Barbosa axiomat. usu freq.* 93. *verbo factum, num.* 30 *et seqq.* Nor are those things forbidden which do not brook any delay, as the pursuit of criminals: *l. pen. C. h. t.*; and the public detention and arrest of debtors suspected of flight, or of things liable to the danger of removal: as is said in *tit. de. in jus vocando* (*ante, tit.* 2, 3, Part III. of this Translation); also the noting of appeals: *arg. l. 1, C. h. t.* (2. 12.); *Brunnemannus add. l. 1*; *Andr. Gayl, libr. 1. observ.* 53. *num.* 11; and the taking of pledges: see *Ant. Matthæus, de auction. libr. 1. cap.* 6. *num.* 22; also the solemn confiscation of goods to be publicly sold, according to most well-known practice. If, however, a sentence have been passed on a Sunday-holiday, whether by a judge or by an arbitrator, it will be neither null on that account nowadays, nor to be rescinded, if we believe in *Groenewegen ad l. ult. C. h. t. et l. 6, ff. h. t.* (D. 2. 13.), where he alleges the very bad corruption of some places in which it is the custom to hold trials only on Sundays. But as this unreasonable custom pleases few, and is condemned by very many, and as the Roman law is not found abrogated in other places where trials are only carried on non-holidays (cases of necessity excepted), and as not less now than by the Roman law is the sanctity of this day established by frequent decrees of the Courts and laws *municipal*, it must rather be taken that such sentences, even though not wanting in the noisy proclamation of a public tribunal, must yet be declared null.

3. And if the citation be made on a Sunday for the purpose of procuring the attendance of any one on a day not a holiday, it will seem to be of no force, interposed by, as it were, the terrible voice of the crier: *arg. l. ult. C. h. t.* (C. 3. 11.); for though it be of an act and done not by a judge, but by a messenger (on which ground *Andr. Gayl, lib. 1. observat.* 53. *num.* 6, 7, maintains that it ought to be upheld), yet, as it contains the execution of a decree nominately interposed as to citation, or flowing from a general mandate given to the officers-of-execution, and as nothing is more repugnant to quiet and disturbs quiet than execution, and as it cannot be denied that such an execution-officer fulfils the duties and office of a judge and represents him, therefore their opinion is more correct who lay down that such a citation is null whenever there is not proved to be any danger in delay; nor is he taken to be contumacious



who does not appear on the day he is in this manner and on such a day bade to appear. For unless it be so laid down, what, I ask, could be otherwise expected than that many execution-officers, busied on other days, would convert the venerated quiet of this day, which should be devoted to divine things, into a perpetual by custom of citations and judicial denunciations: *Baldus in l. dies festos C. h. t. (C. 3. 11.)*, and other authorities cited by *Bessianus ad consuetud. Averniæ, cap. 1. art. 2. num. 2*; *Ant. Matthæus de judiciis disput. 5. thes. 11.*

4. But if any one has been cited on a non-holiday to appear on a Sunday, he is not bound to appear on that day, for the judge himself cannot discharge his duty; and, moreover, as by a citation of this kind, made at a legal time, no profanation should be made of a day devoted to sacred ease, it has deservedly been declared by many that one so cited ought at all events to come on the following non-holiday set apart for trials; nor will he avoid the penalty of delay and contumacy if he be absent: arg. *l. tempora 2, fere in fine, versic. illud etiam C. de temporibus et reparat. appellation, cap. cum delicti 6. circa fin. extra, de dolo et contumacia*; *Bessianus ad consuetudines Averniæ, cap. 1. art. 2. num. 3, 4*; *Christinæus, vol. 2. decis. 158. num. 15*; *Rebuffus ad constit. regias tom. 3. tract. de contumacia, art. 1, gloss. unic. num. 25*; *Groenewegen ad l. ult. C. h. t. de feriis*; *Simon van Leeuwen, cens. for. part. 2. lib. 1. cap. 26. num. 9*; *Anton. Matthæus, de judiciis disput. 5. thes. 12*; *Adde Zoerius ad pand. h. t. num. 5.*

5. "Human" holidays are those which are appointed for the advantage of men. Such, principally, are harvest and vintage holidays, as to the duration of which (although certain times are found laid down in a later law in *l. ut in die 2, l. omnes dies 7. C. h. t. (C. 3. 12.)*). Yet it was more rightly laid down before then that it was permitted to the *præsides* of the provinces to appoint a time according to the custom of each place for the purposes of harvest and vintage: *l. præsides 4, ff. h. t. (D. 2. 12.)*; since fruits do not everywhere mature at the same time, nor grapes become ripe on the sunny hills, but according as one region is nearer to the sun and another more remote from it, so is it the custom of mandators and creditors to pay interest on capital more quickly or slowly.

6. Although, however, no one is forced to litigate unwillingly on human holidays, yet, since they are introduced in his favour, and as everyone can renounce his own right, it is the practice that suits may proceed by the consent of parties, and that what is then done as to time is ratified, whether there be an express declaration of wish apparent, or a tacit one, since the persons cited come willingly, not defending themselves by any exception of holidays. But if any dissent, or the ignorance of either manifestly appear, whatever a judge has decreed on a holiday will be void without doubt: *l. 1, § 1, l. si feriatis 6, ff. h. t. (D. 2. 13.)*; *l. si ut proponis 4. C. quomodo et quand. judex sent. proferre debet (C. 7. 43.)*; nor is what Ulpian says opposed to this, in *l. si feritis 36, ff. de receptis qui arbitr. recep. (D. 4. 8.)*, where he said that if

an arbitrator, forced by the prætor, pronounced sentence on a holiday, that sentence is valid ; for what he says may either be taken of a case where agreeing parties had demanded such forcing from the prætor, or we may interpret Ulpian by Ulpian himself, and restrict the words of this l. 36. to the case in which the day fixed by agreement had passed and could not be longer extended, according to Pomponius: 13, § *arbitrator* 3, ff. *de recept. qui arbit. recep.* (D. 4. 8.); *Bronkhorst, enant. cent. 1. assert. 27*; *Besoldus delibatis juris ad Pandect. libr. 2. quæst. 10. post med.* But all is void which is done on a holiday, or decreed, or adjudged, without the consent of the adversary, unless ratification subsequently followed ; for as that is compared to an order or mandate, so it also adds strength to those giving assent to what has been already done: *l. ult. C. ad Senat. sc. Macedonian.* (D. 4. 28.) *l. si ratum* 6, ff. *quod jussa* (D. 15. 4.), notwithstanding the dissent of Ferdinand Vasquius: *Mustr. controvers. libr. 4. cap. 27. num. 3* ; for although those decrees are non-existent *ab initio*, nay, are *ipso jure* null and void, which are passed on a holiday against an absent and ignorant person, still it is not at all new that in acts *inter vivos* those things are strengthened which, viewed in the beginning, were done against the law and were invalid, whenever they remit their right for whose advantage the first matter was considered void. This needs no proof, unless anyone thinks that all efficacy and advantage of ratification should be entirely done away with.

7. It is free, however, to make citations on a human holiday for appearance on a day not a holiday ; because harvest and vintage holidays, and the like, are only given so that any one should not at that time compel his adversary, occupied with agricultural duties, to come unwillingly to Court: *l. 1, pr. ff. h. t.* (D. 2. 11.) Those things are also rightly done which either deserve great favour, or have reference to the especial public utility, or do not allow of even a moderate delay : such as are named in *l. 1, § 2, l. eadem* 2, *l. 3* ; *Divus Trajanus* 9, ff. *h. t. l. publicas* 5 *l. pen. C. h. t.* (3. 12.) *l. miles* 11, § *sexaginta* 6, ff. *ad leg. Jul. de adulter* (D. 48. 5.)

8. The Princeps, only, declares holidays, not other magistrates, so that those which an administrator or judge declared ought to be wanting in name and result: *l. a nullo* 4. *C. h. t.* (3. 11) ; although the magistrates were able to regulate, according to the custom of every country, the times of holidays granted by the Princeps: *l. præsidet* 4, ff. *h. t.* (D. 2. 12.) ; *l. si in aliam* 7, ff. *de offic. procons. et legati* (D. 1. 16.) ; and even anciently the King of the Sacrifices, or the Sacrificial King, and the prætor, were accustomed solemnly to declare and proclaim holidays, the former for the purpose of rightly conducting the sacred ceremonies, the latter for the purpose of vacation from forensic matters ; as *Rævardus* 5. *variorum cap. 19*, teaches us from Macrobius, Gellius, Varro, Arnobius. On the other hand, no one else than the Princeps has the power of abolishing them, since everything is naturally dissolved in the same way as it was introduced: *l. nihil tam naturale* 35, ff. *de reg. juris* (D. 50. 17.) It is

not to be denied, however, that they may be abolished or changed by the long use of the people whenever the connivance of the prætor is apparent, or his wish is not manifestly thwarted, according to what has been said as to custom abrogating law in *tit. de legibus* (*ante* 1, 8, Part I., of this Translation), *ante*, p. 55.

9. Whenever, however, owing to the difference of the Julian or Gregorian calendar, or on account of the observance of the sacred ceremonies, and the rules prevalent in different places, the times of holidays are found to vary, those holidays only are to be attended to and observed which are received in the place of the tribunal where the litigation is carried on: *arg. l. semper in stipulationibus* 34, *ff. de reg. juris* (D. 50. 17.); unless in that place the privilege has been specially accorded to litigants who are hindered from coming on account of religious duties, that neither plaintiff nor defendant should litigate, except at certain times; this was allowed to the Jews, according to *l. in festivitibus* 2. *C. de Judæis* (C. 1. 9.); *Sande, decis. Frisic. libr. 1. tit. 12. defin. 5. circa fin.*; *Besoldus, delibatis juris ad Pand. libr. 2. quæst. 10. in fine*; *Ant. Matthæus, de judiciis disput. 5. thes. 15*; *Paulus Voet, de statutis, sect. 10. num. 7.* But, except in the case of such privilege, we must keep to the rule that only the holidays of the place of trial give freedom from suits. Hence, in countries which are under the States-General, no holidays fixed by the Pontifical religion are approved, but only those which the reformed churches have acknowledged, as was laid down on the 2 June, ann. 1638, vol. 1. *placit. pag. 261.* Add *Amplification Instruct. Curis Holland. 21 Decemb. 1579, art. 29. vol. 2. placit. pag. 773*; and it is also nominately forbidden that judicial days shall be changed or postponed under pretext of pontifical holiday in any region obeying the said States-General: see *reglement op de politieke reformatie in de Meyerye van den Bosch, et c. 1 Aprilis ann. 1660, art. 18. vol. 2. placit. pag. 2610.*

10. "Postponement" ("*dilation*") which constitutes the second part of this title, is the delaying of a proceeding in Court until another day or limit of time, so that up to that time the office of the judge is quiescent, until the period of the time prayed for has passed by: *l. sive pars* 3. *C. de dilationibus* (C. 3. 11.) This must not be confounded with holidays, although it is true that "postponements" are frequently embraced in "holidays;" for holidays have already been described as "divine" and "human," whereas, on the other hand, "postponements" are only human. The former are, in equity, conceded to all: not so the latter. The former cause all forensic clamour to cease; the latter only in regard to certain persons and causes. The former are useful to litigants only, and give freedom of breathing in respect of lawsuits; the latter are not wont to be conceded to litigants, but simply to those bound to pay, although these latter are not considered in this title: *l. quod dicimus* 105, *ff. de solutionibus et liberationibus* (D. 46. 3.); *l. promissor Stichis* 21, § 1, *ff. de constit. pecun.* (D. 13. 5.); *l. arbitraria* 2, § *qui ita* 6, *ff. de eo quod certe loco* (D. 13. 4.)

11. "Dilations" (postponement) are of three kinds: for some are called "*legal*," which are competent to litigants from the disposition of the law itself, partly before *lis contestata*, as that of the twenty days granted to a defendant cited to deliberate; and of the two months to the plaintiff for the contestation of the suit, and partly after *lis contestata*, for instance, for making proof, *l. 1. C. h. t. de dilation.*, partly after sentence, such as the ten days for appeal, the four months for submitting to execution of a judgment. As to these and others, I have elsewhere specially treated. Other "dilations" are "*discretionary*," such as the judge at his discretion grants from various causes, such as those condemned to restore or exhibit a thing which is in another place, § *et si in rem* 2. *et* 3. *Instit. de offic. judicis* (I. 4. 17.); to the surety, that he may arrest the absent principal defendant and excuss him first: *novell. 4. cap. 1. auth. presente C. de fidejussor. et mandat.* (C. 8. 41.); to the bare detainer, summoned for the recovery of the thing he has, that he may render the owner more sure: *l. 2. C. ubi in rem actio* (C. 3. 19): and thus it is a very common custom that a temporary suspension of a pending suit be sought from the judges, generally called *stateringe*, whenever either of the litigants, engaged in a military expedition and service, is hindered thereby, or by other legal impediment, from being present at private suits which he carries on as plaintiff or defendant: *vide Wassenæer, pract. jud. cap. 5. num. ult.* Other dilations are called "conventional," which are granted to one party at the discretion and by the liberality of his adversary.

12. For although the commentators lay down this as the difference between legal and discretionary dilations, that the limit of the former is considered peremptory, so that another dilation is not obtained after the lapse of that first granted, whereas the limit of discretionary dilation is not so peremptory; but he who has allowed the time of dilation conceded by the judge to pass, can yet be heard at the discretion of the judge: *Ant. Matthæus de auctionibus libr. 1. cap. 17. num. 12. et vulgo D.D. ad tit. ff. et Cod. de dilationibus*. Still it is reasonable that even legal dilations can be "prorogated" by the judge, whenever necessity or greatest equity counsel it, for various causes: so that arbitrary discretionary dilation then seems to accede to legal dilation: *l. si se non obtulit* 4, § *si quis condemnatus* 5, *ff. de re judicata* (D. 42. 1.) *l. 1. in fine C. h. t. de dilat.* (C. 3. 11.) *l. oratione* 7, *ff. h. t.* (D. 2. 12.); and thus, although as a rule it is true that only one dilation is to be conceded in civil cases, *l. ult. ff. h. t.* (D. 2. 12.), and the occasion of granting dilations ought to be cut off as much as possible, *l. tempora. 2. in pr. C. de tempor. et reparat. appellation.* (C. 7. 63.), yet the judge should equitably decide whether there is not cause for again granting another dilation and adding a discretionary one to a legal one: *d. l. 7, ff. h. t.* (D. 2. 12.) *instruct. Curissæ Holland. art. 124, 131.* In criminal cases, on the other hand, resulting in greater prejudice often both to the plaintiff and the defendants, although two dilations could be granted to the plaintiff and three to the defendant for cause shewn, as Paulus warns us in *l. ult. ff. h. t.*

(D. 2. 12.), yet I think it more correct that only one should be granted whenever the judge is persuaded that another dilation is sought for the purpose of dragging on and protracting the cause. Nay, that no dilation is to be granted unless the judge is moved by the nature of the transaction, is laid down by the same Paulus: *l. in crimine* 41, *ff. ad leg. Jul. de adulteriis* (D. 48. 5.)

13. It is more doubtful whether a judge can *restrict* the time of dilation granted by law in civil cases? As a rule that power is to be denied to the judge, lest otherwise we seem to equalise the nature of legal dilations with that of discretionary dilations; and lest the judge, in whose power the question of fact is, but not the authority of the law, makes himself more severe than the law itself: *l. si se non obtulit* 4, § *si quis condemnatus* 5, *ff. de re judic.* (D. 42. 1.); arg. *l. ordine* 15, *ff. ad municipalem* (D. 50. 1.); *junct. novell.* 82. *cap. oportet* 10. But if any other serious cause should counsel it, as the manifest "calumny" of another, or a special cause of favour, no one will lawfully deny to the judge the power of restricting a legal dilation: *l. qui pro tribunali* 2, *ff. de re judicata* (D. 42. 1.); arg. *l. debitoribus* 31, *ff. eo tit. Neostadius Curisæ Hollandicæ decis.* 31; *Ant. Matthæus, de judiciis disput.* 6. *thes.* 48, 49, and *disput.* 13. *thes.* 2, 3, in which way even the times of making supplication against sentences are not infrequently circumscribed in a narrower space than the law had granted, as will be said more fully in *tit. de appellation.* (D. 49. 1.)

14. But the times of holidays are continuous, the holidays being counted together: *l. sive pars* 3. *C. h. t. de dilation.* (C. 3. 11.); *l. tempora* 2. *circ. fin. vers. illud etiam C. de tempor. et reparat. appellat.* (C. 7. 63.) Nor should the spaces of the dilation seem to be so much over-narrowed that, if a certain number of days be expressed in the dilation, the very day too on which the decree of dilation was interposed should go to make up the number. Thus if (for the sake of example) anyone were ordered to intercede within a space of three days, or to appear, or to do anything else, it is more correct to say that the day itself on which anything was done, or on which the decree of dilation was interposed (say the 1st of March) should not be reckoned in, but that besides that day three other days are left at the discretion of him who obtained the dilation: so that on the fourth day of that month he will rightly do that for which the dilation was given. So, if a dilation were granted to anyone on the very calends of January, he is not excluded because the last day of December has passed, unless the very calends of the following year had been allowed to elapse. He also to whom the space of two months is given by law must be heard when he comes on the sixty-first day: for as it is agreed that the space of a doubled month is sixty days, so that the sixty-first day is in vain included, if to the assigned space of two months the day itself on which the assignation is made is sought to be added: *l. ubi lex* 101, *ff. de reg. juris* (D. 50. 17); arg. *l. eum qui calendis* 41, *ff. de verbor. obligat.* (D. 45. 1.); *l. 1, ff. si quis caution. in judicio sist.*

causa. fact. (D. 2. 11.) *accurate Ant. Matthæus, de auctionibus libr. 1. cap. 8. num. 11, 12, 13; Berlichius, part 1. conclus. pract. 74. num. 126; Tyraquellus de retractu gentili art. 1. gloss. 11. num. 17. et seqq.; Mollerus semestrium libr. 1. cap. 7, and a long series of authors cited by them.* And this is so unless it had already become of force by inveterate custom, or had been nominately sanctioned by law, that in certain particular cases the day of the assigned limit should be counted in the conceded days, or the time had to be computed from moment to moment, as I shall say in *tit. de appellationibus* (D. 49. 1.), must be observed as to re-audition. Meanwhile, see *Jacobus Coren observat. 36.* The consequence of which is that that day ought not to be excluded within which anything is to be done by force of legal or discretionary dilation, so that anyone ordered to pay, or except, or do anything “within eight days,” is rightly considered to do whatever was to be done, on any part of that eighth day, so that the whole day is at the discretion of him to whom the postponement was given: *l. 1, § quod dicimus 9, ff. de succes. edicti* (D. 38. 9.); *d. l. 101, ff. de reg. juris* (D. 50. 16.); *d. l. 41, ff. de verbor. obligat.* (D. 45. 16); *d. l. 1, ff. si quis caution. in jud. sisti causa; Aulus Gellius, noct. Attic. libr. 12. cap. 13; Tyraquellus de retractu gentili, § 1. gloss. 11. num. 27; Ant. Matthæus, de auctionibus libr. 1. cap. 8. num. 14, unless here also it was laid down that the time had to be computed from moment to moment, or that had become the practice by custom: Coren, dict. obs. 36.*

15. As to the times within which a civil or criminal trial is to be ended, that will be dealt with in the title *de judiciis* (*post, 5, 1*) as its more proper place.

TITLE XIII.

ON SUMMONSING.

SUMMARY.

1. A "summons" according to the Roman law described: it was a full statement of the coming case to enable defendant to deliberate whether he would submit or contest, or recuse the judge as suspect. By the Roman law the time thus given, on security, was twenty days. In Holland fourteen days, or shorter, according to nature of case and local custom. If he submits and promises payment, time allowed. In summary and insignificant causes the summons is *visd voce*, in more important in writing: both by Roman, Canon, and Holland law.
2. "Libel" or summons defined. It is a written statement of the case. It must be consistent in narration and conclusion: like a logical syllogism with major and minor. The law is the major, the facts and cause of action the minor: then draw the conclusion (or prayer). It is the most important part of the whole summons, and must be formulated with the highest skill, or the result will be loss to the client and shame to the practitioner.
3. Summons must be as certain, clear, and perspicuous as possible, or it will be excepted to as inept and obscure. If no exception taken, trial good in civil cases, but doubtful in criminal cases. Where summons doubtful, interpret to plaintiff's advantage, and so as to save the thing to him: going by other clear allegations in it and its clear conclusion. When there is an ambiguity of verbiage, do not be so much led by the defendant, who will always try to evade the issue: it is thus safer only to exclude from the trial what the parties have expressly agreed should be excluded and to admit that as to which there is no agreement. In stipulations it is true it is the rule to interpret ambiguities against a careless stipulator, but this rule is not extended to judicial proceedings, in which the interpretation is rather against defendant, who moreover could have asked explanation before answering. Answering an inept summons by confession, purges ineptness. Judge may, at any time, ask from plaintiff explanation of obscurities. If after all explanations the plaintiff's right of action remains obscure to the judge, he should rather not give judgment for plaintiff, for such judgment would be void. Unless defendant confesses.
4. To avoid obscurity, state in summons name of plaintiff, defendant, subject of suit, the judge, and plaintiff's right to sue. Also the capacity, where action is tutorially, executorially, or procuratorially brought or by marital right. Such capacity must be initially proved, if excepted to, and before the merits, so that one bringing an action he has not the "capacity" for, may be repulsed at the threshold. Capacity once acknowledged, cannot be afterwards disputed unless cause arise, or there was ignorance. If action is on a cession, state that

- in the summons, so that defendant may know what he has to answer. Rebuffus draws a distinction, however, as to whether plaintiff proceeds in his own name or that of the cedent, in the latter case he must allege the cession in summons.
5. The thing sued for should be exactly described in the summons. Sometimes, however, the description of the thing may be more generally couched: see the several cases stated in the text.
 6. Name or designation of judge must be stated, so that defendant can decline the Court, or recuse the judge.
 7. Especially must the "cause of action" be described. It is *general* or *special*: general in real actions, special in personal: see text.
 8. The name of the action need not be specially stated nowadays, as long as there is a full statement of facts founding it.
 9. As perfection is not human but divine, and as the consequence of the plaintiff's mistake in his summons may be defendant's absolution from the instance, an amendment of summons is generously allowed, at any time up to judgment, on payment of costs: and on giving defendant further time to deliberate. This amendment may be made before or after *litis contestatio*; and Voet goes on in an argumentative *excursus* to shew that no prætorian restitution *in integrum* was necessary for the amendment.
 10. By the Dutch law, however, after contestation the consent of the adversary is wanted for a change of summons, or else an order of restitution *in integrum* and payment of costs. The judge may allow change more than once.
 11. But if the plaintiff does not wish to change, but only to make the summons clearer, he does not pay costs. Instances given, (a) more proofs; (b) definition of time and place; (c) offering in summons fulfillment of contract sued, which necessary offer had been omitted.
 12. Amendment is allowed even if the summons does not contain certain customary "saving clauses" reserving right of change, &c. Voet thinks some attach too much weight to these clauses; for, as he shews, the authority to change is based on the law and not merely on plaintiff's will. By adding these clauses he can get no more than the law allows, and why should what the law allows be denied for their omission.
 13. As to the "salutary clause," praying judge's aid, many give it great virtue, in securing the widest possible condemnation of the defendant, prayed or not prayed. Instance given in text. But Voet thinks the sounder view is that this "salutary clause" is only proposed as measure of caution, and cannot give a judge the power of doing more than the law allows him. Even in its absence the judge can supply the laws the advocate has omitted, *e.g.*, condemning rash litigant in costs, even where not prayed. This is matter of known law. But matters of fact he cannot supply, salutary clause or not. For then he would be advocate and judge, which is unlawful. [And see as to this, *post*, bk. 5. tit. 1.]
 14. A defendant can propose many exceptions, but a plaintiff could not join many actions in one summons. Defendant's position is more favourably viewed than plaintiff's. But if one of two actions obtains, it being uncertain exactly which two were alternatively described, and whichever was right prayed for. Possessory and petitory suits could be brought at same time by two summonsees. But Voet says that nowadays many diverse actions can be cumulated in one summons, and there will then seem to be as many cases as sets of facts. Possessory and petitory suits thus cumulated, and others stated in the text. But not repugnant actions, *e.g.*, testamentary and intestate. Or actions which arise from the same cause and to the same end: instances cited. Nor diverse actions against diverse debtors, from diverse causes: for same cause, *yes*.
 15. In criminal summonses state name of accused and accused, crime, month and year: not the day, unless accused demands it, to prove an *alibi*.

16. Documents relied on must also be issued before contestation of suit: by the parties to a suit to each other, or even by private or public third persons. And all other documents to which reference is made in the documents issued. This both in conventional and reconventional cases. Plaintiff on a ceded action must also thus produce beforehand all the documents the cedent was bound to produce, including cedent's books of account.
17. Names of witnesses need not be furnished, for they may be tampered with, where documents cannot. Nor documents plaintiff does not intend to use, although they might help defendant to prove an exception. Unless they are defendant's own documents, or common to both: in which light merchant's books are regarded when the merchant sues on account of goods sold and delivered. Defendant has then a right to the whole debtor and creditor account. Voet differs specially from those Commentators, like Faber and others, who say that plaintiff must produce everything that can benefit a defendant, even if he (plaintiff) does not intend to rely on them.
18. The defendant is also bound before contestation of suit to produce to the plaintiff documents he holds in common with plaintiff, or which are plaintiff's own. A tutor or conductor of another's affairs, must, when summonsed, produce all his accounts to plaintiff. But not if the documents are defendant's own, for no one is bound to prove his opponent's case, unless the judge specially decree it, or if the *fisc* be the plaintiff, in a civil action. Formerly the *fisc* had extraordinary rights of document production, but this was restricted in later times. A defendant who excepts becomes in so far plaintiff, and must produce the documents on which he founds his exception, but only when the exception is already contested, for plaintiff *may* not prove his summons: and then defendant *ipso facto* succeeds. If plaintiff excepts to the exception, he must in like manner produce documents on which he founds his exception. Examples from the Roman law. References, in support, to the Commentators generally.
19. The whole instrument need not be issued if it has distinct chapters, nor whole book of accounts; but only intelligible extracts with headings, enough for the case. If there is only one transaction, or if everything is at issue, then all must be produced, or if the judge so orders.
20. A third person holding my account is also bound to issue them; but I am not bound to issue my accounts to a third person. But bankers and the like are required to produce their accounts. The Roman bankers were very skilled and careful accountants, and occupied a sort of public position, similar to that of notaries nowadays, to whom therefore very much of what the Roman law says as to bankers is applicable. Ex-bankers must continue to produce: and also the heirs of bankers. But as notarial protocols must be deposited on their death in the public archives, the keepers of those archives will produce them.
21. The production of such accounts by bankers is not promiscuous, but only made to those whose clear advantage it is; and notaries only produce to their principals, or heirs, or those whose clear advantage it was. If this advantage is doubtful, rather await an order of the judge, who will not, however, make a promiscuous order, as, *e.g.*, for the production of the will of a living person without his consent.
22. Bankers must equally produce documents where the suit is against themselves, and not against third persons only.
23. Bankers or their heirs cannot claim the production of their own accounts to themselves. Nor can a second production be claimed by any one, unless the judge so direct for cause shewn, *e.g.*, loss by fire, shipwreck, &c., or possession at a distance. Nor are contracting parties who have each a deed of the sale

- and purchase between them, or of the letting and hiring, bound to produce to each other, unless their own copies are lost, &c.
24. Banker must produce accounts at his place of business, not elsewhere. Accounts must have date and consulship marked on them, for otherwise falsity is easier. Note that where there is a controversy as to proper form and mode of issuing, the custom of place of issue regulates, as in statutes solemnities of are regulated by place where made (see p. 98 of this Translation, § 13.).
25. Bankers have an "action in factum" (adapted to the particular circumstances), against them for the *id quod interest* of the non-production; an action framed on the analogy of actions against tutors, procurators, partners, &c. But malicious desire to injure, or negligence equal to it, must first be proved, to found the action, from which therefore the defendant will be absolved if he swear no such desire exist. If possession is admitted, however, loss of possession of the accounts to be produced will not absolve unless it is from clear accident.
26. This action is given to the entitled party's heir against the banker, within the year. But not against the banker's heir unless he did something by his own act, delict, or fraud: just as in similar circumstances a similar action is given against a land surveyor's heir for false survey of the surveyor: and against one who alienates possession specially to defeat a vested tribunal.

1. To publish (summons), says Ulpian, in *l. 1, § 1. h. t. (D. 2. 13.)*, is to describe fully, or to include in a libel, and to give or dictate it; and Labeo also says that he publishes who leads his adversary to the "*album*" of the prætor, and shews what is to be dictated; or states that which he wishes to use, even if he does not actually then lead his adversary to the "*album*." An "*actio*" or an instrument is published. The publication of the action is the "demonstration" of the coming lawsuit, so that the adversary may deliberate whether he wishes to resist or to yield, and, if he thinks he ought to resist, that he may come instructed by inquiry into the action in which he is summoned: *l. 1. pr. ff. h. t.* The "actor" (plaintiff) ought to come instructed to the trial, since it is in his power whether he wishes to proceed, and when: *tot. tit. C. ut nemo inivitus agere vel accus. teneatur (C. 3. 7.)*; but since the defendant, when he is called, need not to come prepared, it was not astonishing that some delaying extension of time (*induciæ*) was granted to him for consultation: so that even in the later Roman law the defendant, after the citation in law and the conjoined edition of action, could, on making gifts to the officers bringing it, and giving security, deliberate for the space of twenty days whether he would yield, or contradict, or wished to recuse the judge, or to pray that another might be associated with him, as being suspect: *auth. offeratur C. de litis contestatione (C. 3. 9.)* Now, however, with the Hollanders, and the neighbouring nations, fourteen intervening days obtained in lieu of the twenty; and even a shorter time, especially in suits to be ventilated off the bench (*de plano*), or before an inferior judge: in this matter the custom of every tribunal is to be observed: *Groenewegen, ad auth. offeratur C. de litis contestatione. Vide Instruct. Curiss Holl. art. 59. Ordonnantie op de Justitie binnen de steden en ten platte*

landen van Holland, 1 April, 1580, art. 1, 11, 12. If the defendant does not think the action ought to be resisted, but consents to condemnation, that is interposed immediately (*in continenti*); if he offer the payment of what is prayed, he will without difficulty obtain a little delay for payment, on this condition, that if he does not pay within the allotted time he will be condemned not only if present, but if absent, to make payment, being cited anew however to receive condemnation. This "edition" of action takes place *viva voce* in summary tribunals, and in lighter and more trifling causes, in which all roundabout, unnecessary, and superfluous dilations are to be cut away:—in ordinary and more important suits it must take place by libel: this not only was the practice by the canon law: *dementina sæpe 2 de verbor. signif. joined to cap. I. Extra, de libelli oblatione*; but was also received in the later civil law: *auth. nisi breves C. de sententiis ex periculo recitand. novell. 17. cap. sit. tibi 3; Anton. Matthæus, de judiciis disp. 6, th. 32*; and this is to be here also viewed and observed as a received custom in every tribunal of Holland: *Vide, Simon Van Leeuwen, cens. forens. part 2. lib. 1. cap. 24. num. 4 et 5; Wassenæer, pract. jud. cap. 1, num. 30, 40 et seqq.; Instruct. Curisæ Holland. art. 58, 59. na der ampliatië van de instructie van den Hogen en Provinciaelen Rade, 24 Martii 1644, art. 27, 28.*

2. A "libel" is a writing demonstrating the species of the coming suit; and consistent in its narration and conclusion: so that it contains an "*enthymema*," as the logicians call it, or a syllogism drawn from another proposition, and that the major. The provision of the law, which makes the major proposition in the syllogism, being supposed, and which is presumed to be known to a skilled judge, then for the assumed, or minor proposition, stands the narration of fact, comprehending also the cause of action; from which two propositions the one understood, the other expressed, the conclusion of the syllogism is at length formed. And although they do not err who say there are three substantial parts of the "libel," the narration of fact, the cause or medium of conclusion, and the conclusion; as with many others *Ant. Matthæus* says: *de judiciis disput. 6. thes. 18 et seqq.*; still *Simon Van Leeuwen* errs, and deviates very much from logical principles when he is of opinion in *cens. for. part 2. libr. 1. cap. 24. num. 2*, that a "libel" (summons) consists in three prepositions, a major, a minor, and a conclusion, taking the narration of fact for the major, and the cause of suing for the minor: since rather, to one philosophising truly, the whole narration, comprehending also the expression of the cause, is nothing else than an assumption of the fuller argument. For since the "libel" (summons) is considered the chief foundation of the whole suit, and the chief part of the libel is the conclusion, inasmuch as the judge can condemn the defendant, as a rule, certainly to less, but not to more than is comprehended in the conclusion of the libel, it is not surprising that jurists are warned to be careful to frame the conclusion of the summons with the most exact circumspection and provident care, lest they

otherwise cause damage to their client by their temerity, and disgrace to themselves by their imprudence; although as to the Roman law it is more correct to say that only in civil cases a conclusion to the summons is necessary, but not in criminal whenever proceeding is as to a crime to which a certain penalty is affixed by the law, which penalty neither the accuser can change by his petition, nor the judge by his sentence: arg. *l. libellorum* 3, ff. *de accusationib. junct. l. si qua pena est* 244, ff. *de verbor. signific.* (D. 50. 16.); Andr. Gayl., lib. 1. observ. 61. num. 18 et seqq.; Jul. Clarus lib. 5. *sententia* § *fin. quæst.* 12. num. ult.

3. Great care should be especially taken that the summons is certain, as far as the laws allow, and clear and perspicuous: lest otherwise the plaintiff suffer repulse by the exception of inept or obscure libel; if this, however, be not put forward by the defendant, the trial will remain good in civil cases: arg. *l. ult. C. de annali except.* (C. 7. 40.), cap. *significanti-bus* 2. extra, de libell. oblatione; perhaps not equally so in criminal cases: arg. *l. libellorum* 3, § *quod si libelli* 1, ff. *de accusat. et inscript.* (D. 48. 2.); Andr. Gayl., lib. 1. observat. 66. num. 6, 7, 8. et observ. 62. num. 12, 13; Imbertus, Instit. for. lib. 1. cap. 17. in fine; Zangeras de exception. part 2. cap. 14. num. 1 et seqq.; Zoenius ad Pandect. h. t. num. 4. The "libel" will receive in those points in which it is ambiguous, or obscure, that interpretation which is more useful to the plaintiff: *l. si quis in intentione* 66, ff. *de judiciis.* (D. 5. 1.), and by which the thing itself may be saved to him: *l. in contrahenda* 172, § 1, ff. *de reg. juris* (D. 50. 17.), and which most of all accords with the other clear and perspicuous allegations contained in it, especially with the evident conclusion: Zangerus, de except. d. part 2. cap. 14. num. 22 et seqq.; Andr. Gayl., lib. 1. observ. 61. num. 16, 17. et observ. 66. num. 6 et seqq.; Simon Van Leeuwen, cens. forens. part 2. lib. 1. cap. 24. num. 6. For generally, wherever there is an ambiguous wording in actions or exceptions, it is most suitable that that wording shall be accepted by which the thing as to which the proceeding is shall rather be of force than perish: *l. quotiens in actionibus* 12, ff. *de rebus dubiis* (D. 34. 5.), nay, when it is asked "what seems to be brought into trial?" Celsus said that it was dangerous to measure this from the side of the defendant, who will always, in order that he should not be condemned, say that this and that had not come into trial. It is better to say that that should then appear to come into trial about which there was no agreement that it should come; but that should not come as to which it was nominally agreed that it should not come: *l. solemus* 61, ff. *de judiciis* (D. 5. 1.) And although Ulpian and Celsus replied that the obscure words of stipulations should be interpreted against the stipulator, inasmuch as it was in the discretion and power of the stipulator to frame the words more broadly and fully: *l. stipulatio ista*, 38, § *in stipulationibus*, 18. *l. quicquid adstringendæ* 99, ff. *de verb. oblig.*; *l. cum quæritur* 26, ff. *de rebus dubiis* (D. 34. 5.); yet it will not so easily happen that all that which has been done will be *ipso jure* invalid, and appear to be done in vain, as Paulus witnesses in *l. ubi est* 21, ff. *de rebus dubiis*;

and that even if perhaps that should sometimes happen in stipulations, it should not be applied to judicial proceedings, the words of Paul sufficiently shew, in *l. inter stipulantem* 83, et § *si stichum* 1, ff. *de verb. oblig.* (D. 45. 1.), for “if I think, he says, that Stichas stipulated as to one thing, and you think he stipulated as to another, there will be no contract;” which Aristo also thought should be so in Court proceedings. But here (that is in Court proceedings), it should rather be so,—that that should be thought to be prayed as to which the plaintiff thought. For a stipulation is of force by mutual consent, but a legal proceeding is also had recourse to as against an unwilling person, and therefore the plaintiff is rather to be believed, otherwise the defendant will always deny that he consented.” To this it must be added that actions are wont to be begun from matters done before, and from past acts; whereby it happens that those things which are obscure to strangers who knew nothing of what was done, cannot be ambiguous to those whose suit it is, and especially to the defendant, but are abundantly sufficient for one who knows and understands all; and by the very fact of the defendant responding to the dubious statement of case by the plaintiff, he seems sufficiently to have understood what was the desire of the plaintiff; if he did not know at all, he ought to impute it to his own negligence that he did not ask his adversary to declare his mind more fully: *Zangerus, de except. d. part 2. cap. 14. num. 3; Wassenaer, practyk. judic. cap. 1. num. 61.* Whence it is that if a defendant, summoned by an inept summons, confessed in Court that he owed, or had made delict, he is to be condemned, notwithstanding the ambiguity of the libel: *Mynsingerus, cent. 5. observ. 77; Zangerus, d. cap. 14. num. 30.* But as that which is known and perspicuous to the defendant may be obscure to the judge who has to decide, and is ignorant of the previous transaction, it is allowed to him, even after the contestation of suit, to cause the plaintiff to explain his dubious “intention,” so that he may understand as to what matters the suit is to be brought and sentence passed, since the condemnation should not be dubious, but certain: *l. in sententiis* 59, § *qui sortis* 2, ff. *de re judicata*, § *curare* 32. *Inst. de action; Zangerus, d. cap. 14. num. 4.* Certainly, if it cannot be gathered by interpretation what the intention of the plaintiff was, nor from the confused and varying narrations, or if it cannot appear to him from contrary reasonings what right is competent to the plaintiff of proceeding as to the thing as to which he in that manner proceeds, it should rather happen that judgment should not be given for the plaintiff on such a summons; and, if given, it would be considered *ipso jure* useless: *l. idem Pomponius* 5, § *ult. ff. de rei vindicat.* (D. 6. 1.) *cap. examinata* 15 *extra., de judiciis* (D. 5. 1.); *Andr. Gayl, d. libr. 1. observ. 66. num. 1 et seqq. et num. 13, 14.* Unless the defendant, summoned by such an obscure and inept summons, willingly admits his debt or crime, because confession seems to purge the ineptness and nullity of the summons: *Mynsingerus, d. cent. 5. observ. 77.*

4. Obscurity is, however, avoided as much as possible by stating in

the summons who sues, who is sued, what is sued, before whom the suit is brought, and, lastly, by what right the suit is brought. Not only the name of the plaintiff and defendant must be expressed, but also the capacity, if any one sues or is sued in a tutorial, curatorial, or procuratorial name, or by the marital right for one's wife; and although he who proceeds in his own name is not bound, before contestation of suit, to explain what his right or title is, yet he who proceeds in another's name is bound "to prove his capacity," as they say, at the very entrance to the suit, whenever his adversary denies his tutorial, curatorial, or procuratorial or marital capacity: for procuratorial exceptions and similar dilatory exceptions must not only be alleged immediately in the beginning of the suit, but must also then be discussed, so that he may be repulsed from the threshold of the tribunal who has commenced an action for another in a manner he was not authorized to have done: *arg. l. licet* 24. *l. ita demum* 18. *C. de procuratore* (C. 2. 13.) *l. Pomponius* 40. § *ratihabitiones* 3, ff. *de procurator*. (D. 3. 2.) *arg. cap. alia* 1. *extra, de procurator*.; *Rebuffus, ad constit. regias tom. 2. de literis dilatoriis, etc., art. 3. gloss. unic. num. 7 et 16*; *Guido Papæ, decis. 322*; *Gratianus, discept. for. cap. 401. num. 30 et seqq.*; *Brunnemannus, ad l. ult. in fine C. h. t.*; *Andr. Gayl, libr. 1. observ. 3. num. 5, 6*; *Ant. Faber. Cod. libr. 3, tit. 5. defin. 1*. Whence, if an adversary has, at the entrance to the suit, acknowledged the capacity of the adversary in which he proceeds, he cannot afterwards during the suit demand proof of his capacity, unless a cause of doubting emerges, or he may get to know that of which, by a probable error, he was formerly ignorant: *arg. l. licet* 24. *C. de procurator*. (C. 2. 13.) *junct. l. Pomponius* 40, § *pen. ff. de procurator*. (D. 3. 2.) § *ult. Instit. de divis. stipulat.* (I. 3. 18.); *Ant. Fabr. Cod. libr. 2. tit. 8. defin. 9*. And if the plaintiff wishes to proceed on a ceded-action, it is necessary that he declare that also in his summons; for if this be omitted the defendant cannot deliberate whether he should submit or contest; being certain, however, that his adversary had no right of proceeding on his own account: *Henr. Kinschot, response 78. num. 7, 8*. *Rebuffus* says that the right of the cession must only then be shewn at the entrance to the suit if the action be brought in the name of the cedent, not if the plaintiff proceeds in his own name and by an accommodated action (*actio utilis*): see (where he has cited others), *d. tom. 2. tract. de literis dilatoris art. 3. gloss. unic. num. 14*.

5. Nor should the summons be less clear in respect of the thing to be sued for,—declaring what thing, what kind of a thing, and how much should be brought into trial. As, however, a summons framed in general words is sometimes not to be reprobated, as in estate-proceedings as to a whole, in the petition of inheritance, the complaint as to inofficious will, the action for the supplement of the legitimate, the proceeding for a division of inheritance, an action, based on purchase, for the delivery of the thing sold: so also is it in general personal actions if guardianship, things done for another (*negotiorum gestorum*), general mandate, partner-

ship, and the like; in all of which it is enough to pray the inheritance or a division of the things, or a rendering of account and the restitution of the balance. It is the same if the question be as to the giving of "*id quod interest*," as to the restitution of the fruits of the thing possessed, as to the satisfaction of injury done. Nor is it doubtful that where a thing is due as one of a class (*in genere*), or where two things are alternatively due, so that the election is with the debtor, the summons should contain mention of the class, or of each thing alternatively due, not of the species: and as this is so commonly known, it is unnecessary to say more about it. Lastly, that in praying aid against enormous-lesion there should be an alternative conclusion in the summons, is clear from *l. rem majoris 2. C. de rescind. vend.* (C. 4. 44.), and in like alternative manner is it allowed to seek the thing or its value whenever the plaintiff is uncertain whether the thing which is to be given or restored is in natural existence or not: *Mynsingerus, cent. 4. observat. 11; Andr. Gayl, libr. 1. observ. 62; Zangerus, de exceptionil. part. 2. cap. 14. num. 8, 9.*

6. The name of the judge, or at all events his designation, is necessary in a summons, so that the defendant may be able to deliberate whether he wishes to propose an exception declinatory of the Court, or that of suspect judge: *auth. offeratur C. de litis contestatione* (C. 3. 9.)

7. But especially must the "cause of action" be expressed. It is either *general*, which some call *proximate*; or *special*, which some call *remote*. *General* in personal actions is "obligation;" and in real actions "*dominium*," or any other similar real right. *Special* is personal, in actions, is "contract" or the like, whence "obligations" are wont to arise: in real actions that act by which *dominium* is accrued to us, or a *jus in re* acquired. In personal actions the expression of a general cause does not suffice, as where any one should allege that he sued because his adversary was bound to him: but a special cause must be added, viz., as arising from a mutuum, a commodatum, a purchase, or the like, nay, it suffices to name a general cause if a special is understood: *l. et an eadem 14, § actiones 2, ff. de except. rei judic.* (D. 42. 1.) *cap. ult. extra, de libelli oblatione*. But in those actions which are *real*, the plaintiff satisfies if he puts forward in the summons a *general* "cause of action," as for instance, a right of *dominium*, servitude, or of pledge: nor is it necessary that the cause of the acquired ownership or right, *e.g.*, sale with a subsequent tradition or quasi-tradition, or an exchange, or a legacy, or a donation, with the like, should be added: although it may hurt the plaintiff to have added these; since when the suit proceeds the ownership from the cause alleged and proved must be shewn, as will be said in *tit. de rei vindicat.* (D. 6. 1.) This is the reason of the difference between real and personal actions; that anything cannot be mine more than once, but may be owing to me oftener from different causes: *l. et an eadem 14, § actiones 2, ff. de except. rei judicate* (D. 44. 2.) *l. possideri 3, § ex plurimis 4, ff. de acquirend. vel amitt. possess.* (D. 41. 2.) *l. non ut ex plurimis 159, ff. de reg. juris* (D. 50. 17); or what is once mine can-

not become more fully mine from another cause: § *sed si rem* 10. *Instit. de legatis* (I. 2. 20.); but on the other hand, what is due to me from one cause can yet be due to me from another: § *si res aliena* 6. *Instit. de legatis* (I. 2. 20.); and therefore if any one, in an action *in rem*, expressed *dominium* as the foundation of his action, all causes of *dominium* are regarded as being included, because there is always only one cause from which *dominium* was acquired by him. But if he expressed the obligation in a class (*in genere*) the summons would be obscure, because the same thing and the same quantity can be owed on the ground of stipulation, or mutuum, or legacy, or sale; and therefore the defendant would be uncertain by what action he would be attacked: nor could he deliberate whether he ought to resist, nor could he oppose exceptions to the plaintiff: *d. l. 14*, § 2. *de except. rei judicatæ* (D. 44. 2.); *Gudelinus, de jure noviss. libr. 4. cap. 5. vers. tertium seu num. 12, 13*; *Andr. Gayl, libr. 1. observ. 61. num. 2 et seqq.*; *Zoesius, ad Pandect. h. t. num. 6*; *Ant. Matthæus, de judiciis* (D. 5. 1.)

8. With regard to the name of the action, it is more probable that it had to be expressed by the Roman law, even the latest. For it cannot rightly be inferred that because the "forms of action" were abolished, *tit. Cod. de formulis sublatis* (C. 2. 58.), that, therefore, also the names of actions were abolished. Since, therefore, it is not doubtful that by the old law it was necessary to express it in the summons, *arg. l. 1. in fine l. 2, 3, ff. de præscript. verbis* (D. 19. 5.) *l. 1. ff. de æstimatoria actione* (D. 19. 5.) *l. 1, ff. h. t. § si quis aliud* 35 *in fine Instit. de actionib.* (I. 4. 6.); why, I pray, should not that which is not found corrected be prohibited from still standing? It must not, however, be passed over that according to the provisions of the Canon law the name of the action might be neglected in the summons with impunity, if only a full narration of the thing done were made; in the same way in which it was the practice in the civil law in an action *præscriptis verbis*: *cap. delecti* 6. *extra de judiciis*. Which is also so according to our present customs: *Wesembecius, paratit l. ff. h. t. num. 7*; *Gudelinus, de jure noviss. lib. 4. cap. 5. vers. jure civili Romano seu num. 14, 15*; *Ant. Pichardus, ad § 14. Instit. de action. num. 44*; *Imbertus, Instit. forens. libr. 1. cap. 17. verbo quærendam, in med. et d. libr. 1. cap. 15. in fin.*; *Andr. Gayl, libr. 1. observ. 61. num. 1*; *Groenewegen, ad rubric. Instit. de actionibus*; *Parens p. mem.*; *Paulus Voet, ad § 14. Inst. de actionib. num. 2.*

9. But since wholly to err in nothing is more an attribute of divinity than mortality, *l. 2. § si quid autem* 14 *C. de veteri jure enucleando* (C. 1. 17.), and as where a plaintiff errs as to the thing or the action, or the cause of action, the defendant is to be absolved, as if he prayed for an estate and proved that a hundred were due, or framed his action in the summons as on a sale, and shewed that what was owing to him was on a stipulation or a legacy: and thus the "intention" was not proved, and the judge could not condemn in another cause than that for which the prayer was,—because his power did not extend itself beyond the

summons: *l. Bæbius*, 30, ff. *de pactis dotal.* (D. 23. 4.) *l. habebat* 13. pr. ff. *de instit. actione* (D. 14. 3.); *Menochius*, *de arbitrar. judic. libr. l. quæst.* 31; *Henric. Kinschot, respons.* 78. num. 8; *Carpzovius, defin. forens. part 1. constit.* 26. *defin.* 6. Therefore it seemed humane that the plaintiff, troubled and erring in this respect, should be succoured, permission being given to him to amend and alter the summons rashly framed in the beginning. It is more probable that this could not only be done before, but after the contestation of suit, even up to sentence, the tribunal remaining the same: § *si minus* 34 et 35. *Instit. de action.* (I. 4. 6.) *l. in delictis* 4, § *ult. ff. de noxal. act* (D. 9. 4.) But this amendment must not be otherwise made than "as the authority of the perpetual edict warns us, and as equity decrees the right of the allower," according to the rescript of the Emperors Severus and Antoninus: *l. edit. actio* 3 *C. h. t.* (C. 2. 1.) Namely, that equity should so decree the right of the allower, that the plaintiff shall refund to the defendant the expenses of the suit rashly incurred; for in them the rash litigator is to be condemned, nor can any one be more said to be rash than he who, by his own proper confession, declared by the change of summons, is so rash: *l. eum quem* 79, ff. *de judiciis* (D. 5. 1) *l. non ignoret* 4. *C. de fruct. et litium expens.* (C. 7. 51.) And as to "the authority of the edict warning us," it is that the changed summons should be issued, and time given to the defendant to deliberate as to the change: for he may, on a new cause being put forward, or another thing being sought, admit that he is a debtor, while *originally* he was with the best right a contradictor. The consequence of which is that a new *litis-contestation* is necessary for the changed suit, when the defendant, after the change, has thought it advisable to contest: *l. 1, ff. h. t.* (D. 2. 13.) And although it may seem altogether probable that *dictum l. 3. C. h. t.* treats of the change which was made *before* the contestation of suit, if we join it to *l. 1. C. de litis contestatione* (C. 3. 9.) as a latter part of it, as is observed by *D. Noodt, de jurisdict. libr. 1. cap. 13. pag. 52*, there is no sufficient reason why it should not be extended to that change, also, which happens *after* contestation of suit: since it is agreed that in the time of Severus and Antoninus, the authors of the said *l. tertise*, a change could even be made after *litis-contestation*, according to the response of Paulus before given in *l. 4, § ult. ff. de noxalibus actionibus* (D. 9. 4.), and that he flourished under the same Antoninus, history makes manifest. Nor do I think it was necessary, in order that a change should take place after contestation of suit, that there should be a prætorian restitution *in integrum*, as from a just cause of error: since neither the laws which speak of change of summons speak of this, as above cited, nor is it sufficiently proved from § *si quis agens* 33. *in pr. Inst. de actionib.* (I. 4. 6.), where there is neither talk of change of summons, nor of restitution for obtaining liberty of change (for of change is only treated in § 34 and 35), but of restitution against the sentence of the judge who, on account of an over-demand included in the summons, and not amended by the plaintiff, had absolved

the defendant, by the provision of the old law, and had thus brought about that the plaintiff in the cause should incur the penalty of over-demand. [The rest of this section it is unnecessary to translate, as it refers to disputatious arguments based entirely on the Roman law, in support of the proposition that amendment of the summons can be made after as well as before *litis contestatio*. The object of this translation being to put the practitioner in possession of something practical, such disputatious theoretical *excursus* will be omitted for the present. They will afterwards be gathered together in an Appendix, to make the work re-complete for the fuller student of Voet.—*Transl.*]

10. With regard to our law (*moribus nostris*), after full contestation of suit, or interposed “duplication,” change or emendation of summons is not otherwise allowed than if the adversary either consented; or if these were obtained, for that object, a restitution in *integrum*; with a refund of expenses, according to the common opinion of the older interpreters: *Sande, decis. Frisic. libr. 1. tit. 4. defin. 2; Groenewegen, ad § 34 et 35. Inst. de Actionibus; Wissenbach ad Pand. d. part. 1. disp. 8. thes. 20. in fine; Carpzovius, defin. forens. part 1. constit. 11. defin. 1. et multis seqq.; Berlichius, part 1. conclus. prac. 28; Neostadius, Curise supr. decis. 69; Wassenaer, Practic. Judic. cap. 2. num. 35, 36.; Simon van Leeuwen, cens. for. part 2. libr. 1. cap. 24. num. ult.; Paulus Voet, ad § 35. Instit. de actionibus num. 2. ubi plures citati*; and that change may be made not once only, but oftener, at the discretion of the judge, when equity so counsels, see in *Menochius, de arbitrar. jud. libr. 2. casu 176. num. 35, 36.*

11. But if the plaintiff does not desire to change the summons, but only to explain obscurity, the tenor of the summons remaining intact, no costs are on that account to be paid to the adversary, because nothing new seems to have been done, nor the suit commenced rashly, and in any case the obscurity of the “intention” will receive that interpretation which is more useful to the plaintiff: *l. si quis intentione 66, ff. de judiciis (D. 5. 1.) arg. l. heredes. palam 21, § si quid 1, ff. qui test. fac. posse. (D. 28. 1); Berlichius, d. part 1. conclus. 28. num. 27; Carpzovius, d. part 1. constit. 11. defin. 12.* He is regarded as interpreting, not as amending; who perchance expresses more points of proof (*indicia*), or the place or time of the committed “injury,” in an action of “injury,” or anything similar: *Modestinus Pistoris, part 4. quæst. 139. et quæst. 155; Carpzovius d. loco.* So also he who proceeds for the implement of the contract, and afterwards offers, on his side, the fulfilment of the contract, which in the beginning he had omitted to offer: *arg. l. si rem 9, § ult. ff. de pignorat. act. (D. 13. 7.); Tyraquellus de retract. gentilit. § 1, gloss. 18, num. 13.*

12. Nor does it make any difference in what has been said as to changing or amending a summons or of interpreting it, that certain clauses (to which too much weight is attached by many) were added to the summons of petition, such as “saving the right of adding, changing,” &c., because the power of changing or amending does not depend on the will of the plaintiff but on the power of the law: and therefore when these clauses

are added, nothing is permitted to the plaintiff which is otherwise reprobated by law; and on the other hand, when these are omitted, that ought not to seem denied to him which is not found interdicted to him by laws and customs: as is observed by *Zoezius ad Pandect. h. t. num. 11 et 12*; *Gudelinus de jure noviss. libr. 4. cap. 5. versic. nonne igitur actionem seu num. 17, 18*; *Carpzovius, defin. for. part 1. constit. 11. defin. 4. num. 4, 5*; *Ant. Matthæus, de judiciis disp. 6. thes. 24, 25, 29.*

13. With regard to the "salutary clause" directed to the judge, and containing the imploration of his office to supply that which is wanting, many effects are ascribed to it by the interpreters; such as that all remedy competent and resulting from the narrated facts, seems brought into trial; and that condemnation is rightly made for those things which are not expressly prayed: *Vultejus, Jurisprud. Roman. libr. 2. cap. 29. num. 33*; *Andr. Gayl, libr. 1. observat. 61. num. 11, 12. et observ. 151, num. 21*; *Christinæus ad Leg. Mechlinienses, tit. 1. art. 27. num. 3*; *Mynsingerus, cent. 4. observ. 55*; *Brunnemannus, ad l. 30. ff. de pactis dotal. num. 3*; *Sim. van Leeuwen, cens. for. part. 2. libr. 1. cap. 24. num. 4.* And therefore that where a petitory and possessory trial was instituted, if in the "conclusion" mention be only made of the petitory, the judge may yet by his sentence end both possessory and petitory, or only the possessory, if sufficient proof has not yet been brought for ending the petitory; or *vice versâ*, may end the petitory, if the litigants have dealt with the petitory, and the plaintiff has framed his conclusion only as to the possessory: *Andr. Gayl, lib. 1. observ. 61. num. 12*; *Neostadius, Curisæ Holland. decis. 14*; *Sande, decis. Frisic. libr. 5. tit. 4. defin. 1 in fine*; *Menochius, in preludiis de recuper. possess. num. 16*; *Carpzovius, defin. for. part 2. constitut. 7. defin. 9*; *Hartmann Pistoris, libr. 1. quæst. 45. num. 24 et seqq. et libr. 4. quæst. 17. num. 15 et seqq.* But if we follow the surer reasons of the law, it is more correct to say that this salutary clause is to be considered only as extraordinary caution, nor can a greater power accede thence to the judge of supplying those things which are wanting, than is given him by any provision of the law; since here also the power of judging does not depend on the discretion of the judge but wholly on the power of the law. Nor is it doubtful that when a clause of this kind is overlooked the judge can supply from his own office what is wanting on the side of the advocate, namely, in the laws to be dealt with and alleged by them, since even those which are not alleged the judge ought to have known: *tot. tit. Cod. ut quæ devunt advocatis partium iudex suppleat* (C. 2. 11.), and *Perezius* and the Commentators generally concerning it. For which reason he will lawfully condemn a rash litigant in the costs even if they were not prayed, nor any salutary clause inserted in the summons: for this reason, that the law itself dictates and enjoins on the judge that this penalty itself should be imposed on rash litigants, that the conquered may refund to the conquerors the expenses of a calumnious suit, nor should "calumny" go unpunished although the adversary does not follow up the penalty: for that his malice should be

restrained seems of private, and not a little of public, advantage: *l. properandum* 13, § *sive autem alterutra* 6. *l. sancimus* 15. *C. de judiciis* (C. 3. 1.) et *l. Inst. de pœna temere litig.* (I. 4. 16.) *l. eum quem temere* 79, ff. *de judiciis* (D. 5. 1.); *Wissenbach, ad d. l. properandum* 13, § 6. in pr. *C. de judiciis* (C. 3. 1.) But on the other hand, that the judge should supply matters of fact omitted in the summons, even although his help have been implored by the "salutary clause," the reason of justice does not allow, lest he seem to defend a cause rather than to inquire into it, and thus at once discharge, together, the office of advocate and judge in the same suit, contrary to law: *Anton. Faber, Cod. libr. 2. tit. 7. defin. 1; Perezius, d. tit. Cod. ut quæ desunt advoc. partium jud. suppleat, confer tit. de judiciis* (post. 5, 1.), where more is said of the office of judge, both noble and mercenary.

14. Although a defendant can propose many exceptions at once, in the same writing, *l. is qui dicit* 5. *l. nemo* 8, ff. *de exception. præscrip. et præj.* (D. 44. 1.) et *qui autem* 16. *Inst. de excus. tut.* (I. 1. 25.), many actions cannot be cumulated in one summons: *l. cum filius* 76, § *pen. ff. de legatis* 2. (D. 30. 2.) *l. qui servum* 34, ff. *de oblig. et act.* (D. 44. 7.), *l. singulis* 6, ff. *de except. rei judicat.* (D. 44. 2.), because the position of the defendant is more favourable than that of the plaintiff: *l. favorabiliores* 125, § *ff. de regulis juris* (D. 50. 17.); *Wissenbach ad Pand. disp. 8. thes. 19*; unless it be uncertain by what action to proceed: as if the true heir be uncertain whether the possessor of the estate possess it for the heir or for the possessor, or as a legatee: in which case he can join with the petition for the inheritance the interdict *quod legatorum*, that he may obtain the effect of either. For whenever it is uncertain which action the rather obtains, we describe two, with the declaration that we wish by one or other to obtain that which is competent to us: *l. 1, § 1, § quia autem* 4, ff. *quod legatorum* (D. 43. 3.); *Andr. Gayl, libr. 1. observ. 62. num. 4, 5 et seqq.* Just as the plaintiff is neither prohibited, during the pendency of the petitory suit, from proceeding with a possessory suit, before the same judge, another summons being issued as to the possession: *l. naturaliter* 12, § 1. ff. *de acquir. vel amitt. possess.* (D. 41. 2.), *l. cum fundum* 18, § *ult. ff. de vi et vi armata* (D. 43. 16.), for the reason which is given in *l. is qui* 24, ff. *de rei vindicat* (D. 6. 1.), confer *Vinnius select quæst. libr. 2. cap. 39.* But by custom nowadays (*moribus nostris*) it has become the practice that many actions may be cumulated in one summons, according to the provisions of the Canon law, whenever the proceeding is from diverse causes tending to diverse ends: *C. cum delectus* 6. *extra, de causa possess. et propriet. D. D. ad l. edita* 3. *C. h. t.* (C. 2. 1.), *D. D. ad l. edita* 3. *C. h. t. et ad l. si idem cum eodem* 11, ff. *de jurisdict.* (D. 2. 1.), and if perchance the names of the actions have not been expressed in the summons, yet there will be as many actions as there are diverse facts narrated producing diverse actions; and although, naturally, there may be one summons, civilly however there will seem to be as many summonses as there are actions comprehended in one writing: in the same

way in which there seem to be as many separately interposed stipulations as there are things introduced into the stipulation: § *quoties* 18. *Instit. de inutil. stipulat.* (I. 3. 19), *l. scire debemus* 29, ff. *de verb. obligat.* (D. 45. 1.) joined to *l. etiamsi patre* 29, § *ex causa* 1, ff. *de minorib.* 25. annis. (D. 4. 4.); *Andr. Gayl, libr. 1. observ. 63. num. 3 et seqq.* Thus that the possessory suit for obtaining or recovering possession (but not for retaining possession, on account of the repugnant nature of the thing itself) can be cumulated with the petitory suit: *Gayl lays down, d. libr. 1. observ. 63. num. 10; Neostadius, Cur. supr. decis. 127. Curise Holland. decis. 14; Wissenbach ad Pand. vol. 2. disp. 19. thes. 18; Henr. Kinschot, resp. 1. num. 11; Adde tit. de interdictis num. 5 et seqq.* And an action of "injury" with the action of the *lex Aquilia*: *Gayl, d. observ. 63. num. 9; Mynsingerus, cent. 1. observ. 35; Spekhan, cent. 1. quæst. 66. num. 4, 5.* And a personal action with an hypothecary, whenever the debtor is the possessor of the pledged thing: *Guido Papæ, decis. 180; Anton. Faber, Cod. libr. 8. tit. 6. defin. 22; Spekhan, cent. 1. quæst. 66. num. 8; Mynsingerus, d. cent. 1. obs. 58; Christinæus ad Leg. Mechlin. tit. 13. art. 19. num. 7; Imbertus, Instit. forens. libr. 1. cap. 10. verbo pignoratitia actio: Chassenseus ad consuetud.; Burgund, tit. de reatibus rubr. 5, § 2. verbo son principal obligé num. 34 in fine.* Sometimes even a civil action with a criminal, as to which *Fachineus, controvers. libr. 9. cap. 2.* Care must be taken however lest such are cumulated as are naturally contrary to each other, and one of which subverts the other, or an absolutory sentence as to one of which would extinguish the other: *Andr. Gayl, libr. 1. observ. 62. num. 5; Spekhan, cent. 1. quæst. 66. num. 10 et seqq.; Sim. van Leeuwen, cens. for. part. 2. libr. 1. cap. 24. num. 10:* therefore the prayer for a testamentary inheritance is not to be conjoined with one for that which is intestate, as will be said in *tit. de petit. heredit. (post, 5, 3.)*, nor in an action of injury with the action *ex l. diffamari*, since in the one it is prayed that the defendant should amend or repair the "injury," in the other that he should institute an action within a certain time, or otherwise be silent; for that these cannot subsist together is of itself evident: *Vide Carpzovius, defin. for. part 4. constit. 42. defin. 15.* Nor are many actions to be cumulated which arise from the same cause and tend to the same end, as an action for a thing, as on a testament, and a *rei vindicatio* for obtaining the same thing as legated: because the one being obtained the other extinguishes: *l. cum filius* 76, § *pen. ff. de legatis* 2. (D. 30. 2). Nor diverse actions against diverse debtors from diverse causes, for it must happen that confusion arises in that way; it is otherwise if from the same cause there are many debtors together: *Carpzovius, defin. forens. part 1. constit. 2. defin. 6.* For more as to forbidden cumulation of action, see *Zangerus, de exception. part 2. cap. 19.*

15. In issuing a summons in criminal matters it is necessary that the name of the accuser and the accused, the crime, and the date of the year and month of its commission be included: *l. libellorum* 3, ff. *§ de accusation* adde *Zangerus, de exceptionib. part. 2. cap. 14. num. 92 et seqq.; Sim ran*

Leeuwen, cens. for. part 2. libr. 2. cap. 11. But the day need not be expressed, unless the defendant demand it, so that when the day is added, he can prove his absence from the place of the committed crime, and therefore his innocence, and the falsehood of the accusation: *d. l. 3. l. pen. Cod. de accusat. (C. 9. 2.) arg. § item verborum 12. Instit. de inutil. stipulation. (I. 3. 19); Andr. Gayl, libr. 1. observ. 64. num. 11; Julius Clarus, sent. libr. 5 et fin. quæst. 12. num. 13; Wesembecius paratill. Pand. tit. de accusation. num. 12 fere in med.; Zangerus, de exceptionib. part 2. cap. 14. num. 35 et seqq.*

16. Besides the issue of the summonses, the production of documents is also frequent; and that this matter may be a little more fully viewed, it must be taken into consideration that their issue may be made either by the plaintiff to the defendant, or by the defendant to the plaintiff, or by a third person, either a private person, or one filling a public office, to another person whether plaintiff or defendant, whose interest it was it should be issued. The plaintiff is bound to issue to the defendant, before contestation of suit, all instruments which he is to use for the proof of his "intention:" so that the defendant, on their inspection, may more securely deliberate whether he will submit or resist: *l. 1, § edenda 3, ff. h. t. (D. 2. 18.) l. pen. et ult. C. h. t. (2. 1.) Ordonnantie van justitie binnen de steden en ten platten lande van Holland, 1 April, 1580, art. 1, Instructio Curiae Holland. art. 58.* Therefore if mention be made of any instrument in a summons, or if in an instrument already issued a reference occurs to another instrument, the defendant will rightly pray the issue of it, before he goes on to reply and contradict: *auth. si quis in aliquo C. h. t. de edendo (C. 2. 1.); Cravetta, consil. 112, num. 15; Guido Papæ, decis. 116; Rebuffus ad constit. reg. tom. 2. tract. de literis dilatoriis art. 3. gloss. unic. num. 15.* Nor does it matter whether the plaintiff is plaintiff in convention or in reconvention, for not only ought the plaintiff to come prepared in reconvention, but the defendant in reconvention ought to be accorded the power of deliberating, which deliberation cannot be made unless the instruments are issued: *Dutch Consultations, part 2. cons. 109; Ant. Faber. Cod. libr. 2. tit. 1. defin. 6.* If the plaintiff proceed by an action ceded to him, he is bound to issue all those things which the cedent would have issued if he had himself been plaintiff: whether it be the cedent's book of merchant's accounts, or anything else which is the foundation of the action to be instituted: lest otherwise by cession of action, the case of the summonsed defendant be made worse: *arg. l. ex quâ personâ 149, ff. de regulis. juris (D. 50. 17.) l. servum quoque 33, § ait prætor 3 et § seqq., l. pater filio 70 ff. de procurator. (D. 3. 3.); also because, when actions are mandated, the mandatory has their prosecution according as the mandating creditor had it: *l. ex nominis 8. C. de hered. vel act. vend. (C. 4. 37.),* and ought to use that right which was used by him whose place he fills: *l. emtor. 5. C. de hered. vel act. vend. (C. 4. 39.)* Especially when it was in the power of the cessionary to force the cedent by lawful legal remedies to furnish and exhibit all those things which*

have regard to the ceded action: *arg. l. emtori 6, ff. de hered. vel. act. vend.* (D. 18. 4.); *Ant. Faber, Cod. libr. 2. tit. 1. defin. 17.*

17. The plaintiff is not bound to issue to the defendant the names of the witnesses by whose depositions he is to establish his intention, lest they be corrupted by the adversary, perchance, before they are produced which fear of corruption is by no means present in the instrument to be issued: *arg. l. non ex omnibus 39 in fine princ. ff. de receptis qui arbit.* (D. 4. 8.). Nor is he bound to issue those instruments which he is not about to use for supporting the action instituted, even if they might be of advantage to the defendant for proving an exception, for it is not to be imposed upon any one that he should work against his own advantage, or supply arms to his own adversary, whereby he himself may be killed: *d. l. 1. § edenda 3, ff. h. t.* (D. 2. 13.); unless that the exhibition of which the defendant seeks belong to the defendant himself, or is an instrument common to plaintiff and defendant: for nothing is more fair than that which is mine shall be issued to me: *arg. l. prætor ait 4, § hujus 1, ff. h. t.* (D. 2. 13.) *l. pen. C. h. t.* (C. 2. 1.) A consequence of which is, that a merchant who has entered in his books accounts of receipts and expenditure of what is owing and paid, is bound to issue to the defendant summonsed, and praying it, the whole debtor and creditor account, so that the defendant may thence prove how much has been paid: *l. non est novum 5. l. 6. C. h. t.* (C. 2. 1.), whether the creditor proceed on those accounts or on an acknowledgment of debt passed for the credited merchandize: for such accounts seem to be common to both, and written as much for the advantage of the debtor as the creditor: they concern the creditor in so far as refers to expenditure, and the debtor so far as regards receipts or payments: *arg. l. si quis ex 6, § rationem 3, ff. h. t.* (D. 3. 13.); *Anton. Faber, Cod. libr. 2. tit. 1. defin. 16; Brunne-man. ad. d. l. 5. C. h. t.* (C. 2. 1.). But beyond this I think those Commentators go too far, who impose on the plaintiff the necessity of issuing to the defendant not only the accounts, but other instruments of all kinds, whether they are common or not, provided they can be of advantage to the defendant for the confirmation of an exception, although the plaintiff himself is not to use them. As to which, see *Berlichius, part 1, conclus. 45: and that this may be done Ant. Faber also witnesses: Cod. libr. 2. tit. 1. def. 6. in pr.*

18. The defendant also is, on the other hand, bound to issue to the plaintiff instruments common to him with the plaintiff, and much more those which are the property of the plaintiff: *arg. l. prætor ait 4, § hujus 1. l. si quis 6, § unde apparet 5, ff. h. t.* (D. 2. 13.); *arg. l. pen. C. h. t.* (2. 1.); *Ant. Faber, Cod. libr. 2. tit. 1. defin. 6. in not. num. 13;* for as accounts kept by those who manage other people's business, are not written for *their* own advantage, but altogether for the advantage of those whose business they carry on, it is not surprising that those summoned in an action of guardianship and the like, are bound to issue accounts according to which they may be condemned to the plaintiff: *l. Lucius*

Titius 46, § *tutelæ* 5, *ff. de adm. et peric. tut.* (D. 26. 7.); *l. quædam* 9, *ff. h. t.* (D. 2. 13.) But those things which belong to the defendant himself are not to be issued before the contestation of suit, such as the accounts of the defendant, in order that an action may be commenced on them: for it does not behove that the origin of a claim should be founded on the instruments of him who is summonsed: *l. ult. in fine C. h. t.* (C. 2. 1.), and it would be very hard to force the defendant to produce those things by which he would cause trouble himself: *l. nimis grave* 7. *C. de testibus* (C. 4. 21.), so that he is even said to “culumniate” who seeks from his adversary that accounts may be issued to him, maintaining that it is very much to his interest this should be done: *l. penult. ff. ad exhibendum* (D. 10. 4.), unless the judge shall have decreed otherwise on cause shewn: *l. 1. C. h. t.* (C. 2. 1.); or unless the plaintiff be the fisc to whom, by privilege, the defendant is bound to issue the instruments for proving his contention, whenever a civil, and not a criminal, matter is proceeded in: *l. ex quibus dam* 2, § *item* 2. *ff. de jure fisci* (D. 49. 14.) Nor is the meaning of *l. senatus* 3, *ff. h. t.* (D. 2. 1.) different, for though that makes mention of “informer,” it does not refer to criminal accusations, but to those by which estates are declared vacant and passing to the fisc; vacant goods, and many others falling under the administration of the fisc; in which manner it is known that our law distinguishes in several places between those things denounced to the fisc, and those not yet proclaimed or acquired: *l. res fisci* 9. *Instit. usucapion.* (I. 2. 6.); *l. 1. § Divus* 2, *ff. de jure fisci* (D. 49. 14.), and this is the meaning of “informer,” in *tit. Cod. de delatoribus* (C. 10. 11.), which is subjoined to the preceding title *de bonis vacantibus*. Just as in *l. 3, d. tit. C. de delatorib. et l. delator* 44, *ff. de jure fisci* (D. 49. 14.); *Bronkhorst, enantioph. cent. 2. assert.* 94; *Menochius, de arbitrar. jud. libr. 2. cent. 5, casu.* 499; *num. 40 et seqq.* This right of the fisc was in the time of our ancestors so far extended in Holland that if the fisc or the chamber of accounts had a lawsuit pending between it and private persons concerning fiscal or dominical rights, it was by special privilege admitted to an inspection of those things which, issued to the judge by the opposite party, were not communicated to the adversary according to the general practice commonly called “secret documents.” But afterwards this was interdicted by rescript of the Courts, and it was laid down that the chamber of accounts ought, in respect of documents of this kind shewn to the judge by the adversary, to use the same right as private persons: *Rescriptum Ordinum Holland. 19 Jan. 1593, vol. 2. placit. pag. 1441 in fine.* As, however, a defendant, by accepting, becomes plaintiff: *l. 1, ff. de exception. præsc. et præj.* (D. 44. 1.), he is therefore bound to issue to the plaintiff those instruments which he is about to use to prove his exception; but not until after contestation of suit, whenever he thinks the “intention” itself of the plaintiff is to be called into doubt, for it is wont to be held that when the exception is contested there is only the place for it if the plaintiff prove his “intention” according to his assertion:

l. si quid. 9, C. de exception. (C. 8. 36.), this not being done, he who is summonsed will succeed, although he himself produce nothing: *l. qui accusare 4. C. h. t. (C. 2. 1.)* That this was upheld by use is laid down in the *Dutch Cons. part 2. consil. 98*. Yea, indeed, where the custom prevails that the plaintiff ought to issue to the defendant the instruments by which the defendant may strengthen his exception, a similar reason seems to counsel that the defendant ought also to issue to the plaintiff those by which the plaintiff strives to prove his replication: for the plaintiff, at the time he brought the suit, could not be more certain as to the exception of the defendant, nor more prepared for his replication, than the defendant himself was to except: so that, therefore, if favour to the defendant dictates that this issue of documents ought to be made to him, so also would the favour of the replicatory plaintiff replying, and then also excepting to the exception, demand that no less like favour ought to be granted to him of demanding a similar right of issue to himself: for it will not seem that the plaintiff in that way founds the origin of his petition on the instruments of him who is summoned contrary to *l. ult. C. h. t. (C. 2. 1.)*; but rather that he defends and preserves the sufficient proof of his "intention," against the unjust and vain ways of escape of the defendant: *Henricus Kinschot, respons. 36. num. 3 et 4; Menochius, de arbitrar. jud. libr. 2. cent. 5. casu 499. num. 83, 84; Bronchorst, enantioph. cent. 2. assent. 94; Berlichius, part 1. conclus. practicab. 45. num. 49; Brunnemannus ad l. ult. C. h. t. circa fin. Adde Bachovius ad Treutler. vol. 2. disp. 5. H. 4. lit. A. vers. ne tum quidem*. Which was also approved in certain cases by the Roman law; for if, to the legatee seeking a legacy, the heir proposes by exception the benefit of the Falcidian law, the legatee rightly desires the issue to him of all instruments from which the "quantity" of the patrimony can be learned, so that he may thus prove his replication as to the sufficient ability of the estate for the payment of the whole amount: *l. pen. § ult. ad leg. Falcid. (D. 35. 2.)*; or if the testator legated what came to him from the estate of Titius, the legatee, excepting that a less quantity had come from the heir, might legally demand that the "tablets" might be exhibited to him in which the testator had entered what was received from that estate: *l. qui concubinam 29. § cum ita legatum 2, ff. de legatis 3 (D. 30. 3.)* It is the same in the case of *l. prædiis 91, § Titio 3, ff. de legatis 3 (D. 20. 3.)* The reader who desires to see more gathered together as to issue of documents by defendant to plaintiff will find it in the common opinions of the Commentators, in *Menochius de arbitrar. jud. lib. 2. cent. 5. casu. 499; Berlichius, conclus. practic. part 1. conclus. 45. num. 23 et mult. seqq.; Hahnus, in notis ad Wesembecius parat. l. t. num. 12.*

19. But when there is a question as to the issue of instruments, the whole instrument need not be issued if it contain many chapters treating of separate things, much less a whole volume of accounts, or a whole mercantile book, having a description of all receipts and expenses; but rather only that part, or only that chapter, which refers to the controversy

brought to trial, and to its proof, together with the chapter or beginning of the accounts, or instrument, without the inspection of which those parts issued cannot be understood: in which sense the jurisconsult admonished us that "accounts were to be issued from the heading" in *l. senatus* 3. *l. argentarius* 10, § *edi autem* 2, *ff. h. t.* (D. 2. 13.) Certainly if the instrument or accounts be written as to only one transaction, or if all the contents of the accounts and instruments be perchance brought into one general trial, it is not open to doubt that the issue must be made of the whole writing: *l. 1.* § *edere non videtur* 4, *ff. h. t.* (D. 2. 13.) *l. Lucius Titius* 46, § *tutela* 5, *ff. de admin. et peric. tut.* (D. 26. 7.) To the judge himself, so ordering, the whole volume or instrument must be issued, as Andr. Gayl lays down is the practice in *libr. 1. observ.* 106. num. 10.

20. If then a third person is ordered to make issue of the instruments or accounts existing in his possession, for the utility of the plaintiff or defendant, or, generally, of him to whose advantage it was, what then if a third person possess my instrument or my accounts? Equity will then also dictate that production should be made to me: *l. in hac actione* 3, § *interdum* 14, *ff. ad exhib.* (D. 10. 4.), *tot. tit. ff. de tab. exhib.* (D. 43. 5.), concerning which more fully in the said title. So that the fiscus itself is also bound to issue to a private person, instruments he holds in common with a private person: *l. pen. C. h. t.* (C. 2. 1.), provided he to whom they are issued will give security that he will not use them against the fisco: or if he use them, will lose his cause. Nor is it surprising that the fisco need not issue so as to hurt himself, since no one else ought to issue acts or instruments against the fisco: *l. in fraudem* 45, § *neque* 5, § *ipse autem* 6, *ff. de jure fisci* (D. 49. 14.) Certainly the laws do not dictate that any one is bound to issue his own private accounts to a third person to carry on a suit with another: for although everyone may be unwillingly compelled to give evidence as to the truth in the case of a third person, as will be said in the *tit. de testibus* (*post*, p. 22. 5.), that is, however, not found extended to issuing instruments (*see*, however, *Schurpfium. cent. 2. consil.* 85.), even though, as we shall now more fully lay down, it were declared by prætorian edict that bankers, or money changers, (also called *collectarii*, *collectores*, *coactores*) should make issue: *Gothofredus ad l. quisquis judicii* 16. *C. si certum petatur*: whose duty was in a certain measure public, or at least had a public cause, *l. argentarius* 10, § *ideo* 1, *ff. h. t.* (D. 2. 13.), and their bank had public trust: *l. si ventri* 24, § *in bonis* 2, *ff. de reb. auctor. Jud. possiden.* (D. 42. 5.); nor could the office fall to a woman but only to a man: *l. pen. ff. h. t.*; although slaves also could be money-changers, as Ulpian notes: *l. prætor ait* 4, § *sed si* 3, *ff. h. t.* By these also many other things, not appertaining to this title, were done, as you will see gathered up by *Uijacius ad l. si unus* 27, *ff. de pactis* (D. 2. 14.) *et libr. 10. observ.* 14; *Speckhan, cent. 1. quæst.* 68; *Ant. Matthæus, de auction. libr. 1, cap. 2. num.* 7, 8, 9, *et cap. 3. num.* 2. Moreover, as being very much

skilled therein, very many Romans got them to write and make the conditions of their contracts, the accounts of their moneys and transactions their payments, their expenses, and the rest: so that it was their especial duty and care diligently to make accounts of their acts: *l. argentarius* 10, § *ideo* 1, ff. *h. t.* (D. 2. 13.), and this part of their duty did not much differ from that which is nowadays the duty of our notaries or drawers of public instruments: therefore what the Roman laws lay down as to money changers, may not ineptly be extended to notaries, &c., and also to scribes, secretaries, and the like officers added to judges, according to the Canon law: *cap. quoniam* 11, *extra de probation.*, as with others *Ant. Matthaus* notes *de judiciis disp.* 6. *th.* 41; *Groenewegen*, *ad l.* 10, ff. *h. t.* Nor does it matter whether they were money changers at the time at which the issue was prayed, or whether they had ceased to be so: *l. prætor* 4. *etiam* 4, ff. *h. t.* The heirs also of money changers ought to issue these things, whether they were in joint possession with the deceased or not: for since they succeed to the place and the right of the money changers, they ought to discharge their functions: *l. quædam* 9, § *nihil* 1. *l. si quis* 6, § *cogentur* 1, ff. *h. t.*, but not legatees and other singular successors, unless they possess: *d. l.* 9, § 7, ff. *h. t.* (D. 2. 13.). But since with us the acts of notaries ought, after their death, to be lodged in the public archives, if that is done they will make issue to whom the care and custody of such instruments has been publicly committed: or if scribes and the like have framed them, their successors in office will do so: *Groenewegen de loco*. If there were money changers, or many heirs of one, all ought to issue or to subscribe to the issue made by one: *d. l.* 6, § 1, ff. *h. t.* (2. 13.)

21. But all accounts are not to be promiscuously issued by money changers to all desiring it, but only to those who declare that it is to their advantage, by interposing the oath of calumny, lest perchance they should demand that there should be issued to them unnecessary accounts, or accounts which they have, for the sake of vexing the money changers: *l. si quis* 6, § *exigitur* 2. *l. quædam*. 9, § *cæturum* 3, ff. *h. t.* (D. 2. 13.) But as by our customs everywhere, this oath is not longer accustomed to be taken by those who pray the issue of documents from notaries: *Wesembecius, paratit. Pandect. h. t. num.* 13; *Berlichius, part 1. conclus.* 45. *num.* 4, 5. So also notaries, scribes, and the like public persons, do not promiscuously issue to those praying for them, instruments drawn up by them, but only to those who commissioned the drawing up of the instrument, or to their successors, or to whose advantage it is evidently and apparently necessary from other honest and just causes; in other cases they will, in doubtful instances, act more correctly and advisedly if they await a decree of the judge, interposed on cause shewn: *arg. l.* 1, 2. *C. h. t.*; *Wesembecius, paratit. Pandect. h. t. num.* 11; *Andr. Gayl, libr.* 1. *observ.* 106. *in pr.*; *Hieron. Scharpfius, cent.* 2. *consul.* 85; *Dutch Cons. part 4. consil.* 11 *et* 12; *Sim. van Leeuwen, cens. for. part* 2. *lib.* 1. *cap.* 8. *num.* 4. For it is not even in the power of the judge to

decree, promiscuously and at his will, the issue of *all* instruments : for how if anyone desired the production to himself of the testament of another person still alive, without that other's wish ? Or how if any one against whom witnesses have deposed should claim for himself the right of copying and inspecting their depositions, before the publication of the testimony was made according to the provisions of the law or the customs of the Court ? That only the testament of a dead person was to be exhibited to a third person is laid down in *l. 1, § penult. ff. de tabulis exhibend.* (D. 43. 5.) *l. tabularum 2, § si dubitetur 4, ff. test. quemadm. aper. inspic. et describ.* (D. 29. 3.), and he who opened the testamentary tablets of a third person, recited them, or resealed them, fell under the law : *Cornelia, de falsis, l. 1, § is qui aperuerit 5, ff. ad leg. Corn. de falsis* (D. 48. 10.) ; *l. si quis aliquid 38, § qui vivi 7, ff. de pœnis* (D. 48. 19.) ; *Paulus, recept. sent. libr. 5. tit. 25, § 6.* And in vain by the Roman law, as also by modern custom, would there then be need for a "publication" of testimony after ulterior renunciation of production, on account of the imminent fear otherwise of subornation and falsity, if at any time the judge could lawfully interpose a decree for the production by a notary of these evidences : *Dutch Cons. part 4. cons. 12. in fine.*

22. It does not, moreover, matter whether he who demands production from the money changer wishes to use the produced against a third person, or against the money changer himself, when he is bringing a suit against him, *l. argentarium 10. pr. ff. h. t.* (D. 2. 13.), for as money changers make up the accounts of individuals, it is fair that what they make for account of another they should exhibit to him as being, as it were, his own instrument : *l. prætor ait 4, § 1, ff. h. t.* (D. 2. 13.)

23. His own accounts are not, however, to be issued to the banker himself or to his heir, since he could be himself possessed of the instrument of his own drawing, and it would be absurd that he should pray that there should be issued to him who is himself the cause that he should be bound to issue. Nor to him to whom production has been once made must it be again made ; for the first production seems abundantly sufficient for him. For cause shewn, however, the prætor orders that both to the banker himself and to his heir, even if to him production has already once been made, production shall be re-made. For how if he have by shipwreck, house-break, fire, or other similar cause, lost his accounts, or proves that he has them at a distance ; or what if the first edition appear to be not so fully or not so legally made ? *l. si quis 6, § prætor ait 9, 10 ; l. 7. pr. et § 1, ff. h. t.* (D. 2. 13.) Nor will you hence wrongly conclude, by similitude of reason, that as a rule in those cases in which any one, on account of a mutual contract voluntarily binding—say purchase and sale, letting and hiring, partnership—has the instrument of the agreement of contracting parties, the one need not produce it to the other ; but if either of them complains that he has lost his, he will rightly pray from the other production and liberty of solemn copy : *Papon. libr. 9. tit. 8. arrest. 7 ; Henr. Kinschot, respons. 36. num. 1.*

24. Production is to be made by the banker in that place where he carried on his banking business: not elsewhere, except at the expense of him praying it, and on delay being granted for obtaining it; so that, if he carried on his banking in another province, and have his accounts in another province, he is yet bound to publish there where he carried on business, for he is considered to have thereby offended by removing his accounts: *l. prætor ait* 4, § *ult. l. 5, l. 6. pr. ff. h. t.* (D. 2. 13.) And accounts must be issued with the date and consulship affixed; but other instruments, or rather copies written from the originals, without the day or consulship when they were written: *l. 1, § editiones* 2; *l. prætor ait* 4. *pr. ff. h. t.* (D. 2. 13.); *l. tabularum* 2, § *diem* 6, *ff. testam. quemadm. aper. inspic. et describ.* (D. 29. 3.) The reason why date is affixed to accounts is this, that accounts consist of two pages, one of receipts the other of expenses, the collation of which in balancing is useless, if you omit the date and consul; but instruments which the prætor orders the plaintiff to produce to the defendant before contestation of suit are considered sufficiently useful to the defendant even if they have no day affixed: unless where it is feared that falsity may be assumed from the omission of the day then the day is added: *d. l. 1, § 2, ff. h. t.* (D. 2. 13.); *Cujacius, libr. 10. observ. 14. in pr.* But as when the day of issuing the instrument is not expressed it can easily lead to false machinations, and as from the addition of the day the defendant can more rightly conclude as to the verity or falsity of that which is contained in the instrument: *arg. l. item verborum* 12. *Instit. de inutil. stipulation.* (D. 3. 19.); *l. optimam* 14. *C. de contrahend. et commit. stipul.* (C. 8. 38.), hence Groenewegen says that date and consulship should now be given of other instruments as well as in the issue of accounts. And add *Berlichius, part 1. conclus. 45. num. 27 et seqq.* And this is universally to be observed, that regard must be had to the custom of that place where the issue is made, if there be a controversy as to the manner and form of issue: *arg. l. testamenti* 2. *C. quemadm. testam. aper. inspic. et descr.* (C. 6. 32.); add what has been said as to the *Const. Princip. parte altera de statutis num. 13 et seqq.* (Tit. 1. 4. 2. *Part I. of this Transl. p. 98.*)

25. And as tutors, procurators, partners, are forced by the ordinary remedies—say of guardianship, mandate, and partnership—to render and produce accounts, so also bankers and the like are to be condemned by an action *in factum* (i.e. adapted to the particular facts), introduced by prætorian edict, if they do not make production, “*ad id quod interest*,” regard being had to the time on which the prætor decreed that the production should be made, even if it afterwards began to be more or less to the advantage of the minor: *l. si quis* 6, § *ex hoc* 4. *l. ubi exigitur* 8, § 1. *l. argentarius* 10, § *ult. ff. h. t.* (D. 2. 13.); *Cujacius, d. libr. 10. observ. 14.* As, however, the recovery of “*id quod interest*” will not otherwise have place than if by malicious injury, or negligence equal to malicious injury, it have happened that the order of the prætor as to production has not been obeyed, whether no production at all has followed, or whether it

has been made so as maliciously to injure: *l. ubi exigitur* 8, *pr. ff. h. t.* (D. 2. 13.) So the consequence of this is, that he will be absolved from whom the production is prayed whenever he will declare on oath that he neither possesses the accounts or instruments sought, nor has fraudulently ceased to possess them: if his adversary cannot prove the opposite: *arg. l. prætor ait* 4, § *sed si servus* 3; *l. quædam* 9, § *nihil interest* 1, *ff. h. t.* (D. 2. 13.) *l. ult. in med. Cod. de fide instrument.*; *Carpzovius, defin. forens. part. 1. constit. 17. defin. 28*; *Ant. Thesaurus, decis. 171*; *Berlichius, part 1. conclus. 45. num. 3*; *Brunnemannus, ad d. l. ult. C. de fide instrument.* Certainly if one confesses he had, or is proved to have had, possession during the suit, or a little while before, he will not be absolved, although he is ready to declare on oath that he lost it without fraud, unless he quite clearly shew that it was an accident through which the loss happened; otherwise the proffered taking of an oath will not free him from being condemned in "*in quod interest*," to be estimated by his adversary swearing to it on oath, or at all events to be fixed at the discretion of the judge, especially when he desires production of instruments *sui juris*, that is, his own instrument, and as to which the applicant has the right of production: *l. non ignorabit* 4. *C. ad exhibendum* (C. 3. 42.); *l. pen. ff. de in litem jurando* (D. 12. 3.); *arg. l. si creditor* 5. *C. de pignorat. act.* (C. 4. 24.); *Dutch consultations, part 3. vol. 2. consul. 385. revera* 255.

26. This "*action in factum*" (i.e. an action according to particular circumstances) is not only given to him to whom the production had to be made, but also to his heir; not, however, beyond the year, nor against the heir unless by his own act: *l. ult. ff. h. t.* (D. 2. 13.), as if it arose from a certain delict and fraud, on the analogy of the *action in factum* against a measurer of land [land surveyor,—*Transl.*] for a denounced false measuring; and against him who alienated for the purpose of changing the tribunal: *l. si duobus* 3. *pen. ff. si mensor fals. mod. dixerit* (D. 11. 6.); *l. item si res* 4, § *ult. l. 5, 6, 7, de alienat. jud. mut. causâ* (D. 4. 7.)



VOËT'S PANDECTS,

TRANSLATED BY

JAMES BUCHANAN.

INDEX TO PARTS II. & III.

LONDON :
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

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Index

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E. S. T. JONES

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LONDON :
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHANCERY CROSS.

BOOK II. TIT. XIV.

ON PACTS.

SUMMARY.

1. What a "pact" is, defined, *i.e.*, an agreement of two or more, to give, do, or furnish anything; but producing no action. It differs from a pollicitation, which is the promise of the offering party only. And from a contract, which produces an action. Whether it is a pact or contract which is entered into, is determined by the words, but more by the intention of the parties.
2. Pacts are nude, or not nude, *i.e.*, "clothed." A nude pact produces only a natural obligation, and no action. Not even a doubled nude pact produces an action. Nor a pact strengthened by an oath. Passages in the Digest which seem to "look the other way" explained and reconciled by Voet.
3. A releasing nude pact annuls a natural obligation *ipso jure*, but a civil obligation only by force of an exception raised. *Exceptions* to this: pacts favoured by law annul even civil obligations *ipso jure*, *e.g.* (a) pacts thus annul actions of injury and theft; (b) hypothecary actions based on pacts of hypothec are annulled by contrary pacts *not* to hypothecate. But if the pact is that principal debt cannot be sued for, then the hypothecary obligation, being accessory only, ceases by exception, just as the principal obligation would itself cease. Pact does not remove pact *ipso jure*: so subsequent pact *not* to sue weakens former pact to sue *not ipso jure* but by replication. If any one by nude pact promises to release his debtor but really does not interpose the pact "not to sue," the Roman law allowed no action. By the Dutch law, which gives equal force to nude pacts as to stipulations, an action of release would lie, but Voet shows how the better course is to await the creditor's action on the obligation, and raise an exception of pact to release. Just as a released legatee excepts to the heir's action, although he has also the action on the release.
4. But *obligatory* nude pacts have strong remedies, can be novated, constituted, compensated, can be subject of sureties and pledges, &c.
5. What are *obligatory* unnude pacts? They are pacts added to main agreement, *e.g.*, hypothec, interest, &c., enumerated in the text. These pacts either refer to the accidentals, or essentials of a contract. You may add a pact of remuneration to mandate and deposit, which are strictly unremunerated, and yet though remuneration is got, those contracts of mandate will remain. In "deposit" the very articles should be returned, but there may be an added pact that *as much* money should be returned, with interest. These pacts are but partly recessionary from the contract to which they are added. Others recede wholly. Here sometimes the main transaction stands, but the pact

is void, e.g., where the pact is that a deposit or a precarium shall *never* be returned. Sometimes the added pact changes the main transaction, e.g., contract of purchase with pact of non-payment of purchase-money added, is viewed as a donation. Donation *mortis causa*, with pact of irrevocability, becomes a donation *inter vivos*.

6. A valid pact added in immediate connection (*in continenti*) to a *bonæ fidei* contract produces an action; not an altogether new action, but the action proper to the main contract is adapted to the pact. A. and B. are, e.g., neighbouring neighbours. A. sells his estate to B. on condition that B. gives him a servitude through the sold property to A.'s other estate. For the recovery of the purchase amount, &c., A. has against B. the *actio empti*, which, though it have strictly nothing to do with the matter of the servitude, is nevertheless adapted to securing it. It is thus not the mere fact of the addition of the pact that produces the action, but the fact of its addition in immediate connection.
7. On a pact added to a contract of strict law no action is given. Voet, in an elaborate passage, gives his view of the meaning of l. 27, § 6, ff. *de pactis* and l. 40, ff. *de reb. cred.*
8. Pacts added after an interval to *bonæ fidei* contracts are either "adding" pacts or "detracting." The former affect not the substance, but the adminiculars of the contract. Detracting pacts are those receding from the substance. The former produce an action: the latter only an exception.
9. NOWADAYS an action, says Voet, is given on a nude pact, contrary to the doctrine of the Roman law. Voet argues this, and shows where VAN LEEUWEN, who differs with him, is, he thinks, wrong.
10. Pacts are *public* or *private*. Public refer to treaties of peace, &c. Pacts with rebels, thieves, and heretics are equally to be observed; for they also are men, with human rights. Faith once pledged must be upheld.
11. Pacts are *real* or *personal*. Those are *real* which benefit heirs and sureties. You can pact to benefit all your heirs. Also make a *liberating* pact for one heir specially. By the Roman law you could make an obligatory pact also: for one heir, if it was "to give" and not "to do." NOWADAYS, however, in Voet's opinion, you can make any kind of pact for an heir: but you cannot wholly burden one heir's share of inheritance to benefit other heirs'. GROENEWEGEN DIFFERS. Even a "real" pact may contain mention of a person: its reality or personalty is to be determined from the maker's intention as well as words.
12. Pacts of sureties do not benefit principal debtors nor co-sureties, unless it were nominately so conditioned; then the exception of fraud could be pleaded. Or unless one were a surety *in rem suam* for his procurator or partner. By the Roman law one could not pact for another; but by the law NOWADAYS it is different.
13. Personal pacts only benefit the pactor and not his heirs, nor his purchasers, donees, legatees, and individual successors.
14. Personal pacts do not benefit sureties, who have renounced the benefit of "order": if not, yes. A creditor may legally pact not to sue his debtor, and yet the debtor's surety may continue bound: Voet, by reference to mandate, argues away the difficulties of those who think otherwise, on the ground that cession of action to the surety against the principal debtor would thus cease. A mandator he shows does require cession of action from mandatary, but a surety does not require creditor's cession of action against the principal debtor: for he has the action of mandate or of "work done." Besides the summoned surety can always call upon the principal debtor to defend the suit. If it be uncertain whether a pact is personal or real, a real pact is rather presumed than a personal: on the principle that a pactor intends to pact for his heirs and successors and not only for himself.
15. Pacts are also *express* or *tacit*. Express declare themselves: tacit are gathered

from the circumstances, *e.g.* :—(a) bringing furniture on to an urban estate tacitly means that it is subjected to the rent-hypothec; (b) interest for two years being stipulated means that during that time the capital shall not be recovered; (c) where estate-creditors go, of their own will, against the creditors who have bought from an heir, passing by the heir, they cannot return to the heir. VOET DIFFERS HERE FROM GROENEWEGEN, who allows the creditors so to do if they believed the buyers could pay. Voet defends his view on the two grounds, that poverty is no bar to credit, and ignorance of debtor's condition does not excuse. One who might pray "separation of goods" but trusted to the heir, cannot refile from the election he has thus made. And delegation of, or sale to, a poor man, does not matter on account of poverty. The return of a pledge or a chirograph is a tacit pact that the principal debt shall not be sued for. If the creditor however denies that the security or chirograph was returned to the debtor, in whose possession it is, on account of payment, the debtor must prove payment, for no one is presumed to donate, especially in case of doubt. If one of two or more chirographs is returned, the debtor must likewise prove the creditor's intention to restore, for the creditor might have thought it enough to keep one only as sufficient proof. If there be one chirograph and many debtors on it, and it is restored to one, he is liberated, but not the others. In a case of doubt one is presumed to have rather pacted for himself than for others.

16. Pacts must be honourable and possible, and not opposed to public interest: not base, foolish (*e.g.*, that one's valuables should be buried with one), or impossible, and inviting to crimes: nor as to the future succession of a *certain* third person living; nor limiting it, even with consent: nor that one shall succeed to the other (unless among soldiers), nor whoever is the survivor to whoever is the first dying. But if the pact be as to succession to a third person and he consented and did not alter his will, it is good. Dotal pacts it is true are valid by the Dutch law, and do regulate successions as between spouses and third persons, but they are exceptions to the general rule above stated. If any one promised another to institute him, or leave him a legacy, and does not afterwards do it, no action arises on the pact: not even if it is by title of donation *inter vivos*, the execution thereof being stayed till after death. Voet, agreeing with Peckius and others, strongly upholds this last view, though others differ.
17. But pacts as to succession to *uncertain* third persons, even if living, are valid; or to certain third persons, if deceased, whenever the doubtful condition of a suspended *fideicommissum* is removed by the fideicommissary heir's surrender.
18. Pacts between a patron and his client, for a share of the lawsuit, are invalid as "base." Also purchase of others' lawsuits. Advocates in Holland swear not to enter into such pacts. Nor can they bargain for fees only on victory gained. Some even think that no legacy or donation can be given to an advocate or attorney during the suit, but VOET'S OPINION is that it can, unless the Judge can easily observe extortion, not lightly to be inferred. For there may be many gifts which have no connection with the suit itself.
19. VOET IS OF OPINION that pacts can be made between medical men and their patients, if not dishonourable. But not if the medical man uses adverse medicines to retard recovery and then gets profit; malice is not however presumed. Patients rashly pacting in their sick anxiety are not bound if they do not wish, nor if they pact in moments of danger. Voet confirms his opinion by references to Roman Emperors' rescripts and the humorous lines of Martial.
20. Those pacts are invalid by which an owner diminishes his discretion and control over his own things, so that he may do nothing as to them; unless it were to the advantage of another that he should so pact, or to his own advantage. These pacts do not affect the thing itself, but constitute a personal obligation. Instances given of advantage and no advantage. The action would as a rule

be personal, and not real, and, being personal, would fade away if there were really no personal advantage to recover.

21. Pacts against the freedom of marriage must also be reprobated. A pact between two persons by which it is stipulated that whoever marries first must pay the other a certain sum is void. But it is allowable to encourage continuing widowhood by promise of donation, legacy, &c.
22. No one can injure others by pacting; not even a principal debtor his surety.
23. So much so that if the major part of the creditors pact with a debtor as to a part of the debt, that does not injure the other non-consenting creditors. Nor when a tutor has in the name of his pupil contracted with the major part of the creditors is the pupil himself barred, if it is a prejudicial pact, from suing for the whole. The peculiar law of Zeeland was that a certain majority of creditors could, in a certain way, bind the minority, properly called together.
24. But the pact of the greater portion of the creditors injured the minor portion if the heir of a burdened debtor was unwilling to adiate unless a pact were made as to a remission of part of the debt. Such a pact therefore allowed, and minor part bound. *Bona fides* assumed rather than *mala fides*. If one or other side be injured in such a case, then rather the minor.
25. In that case even a tutor pacting in the name of the heir is bound to be content with the same pact, if he is a creditor.
26. Nor is this law changed, or abrogated by our law, on account of benefit of inventory having been introduced.
27. The same applies if the burdened debtor be alive but hide, and no goods of his are to be found: and he will not appear unless part of his debt be remitted.
28. He who has pacted as to part with his debtor cannot recover the part remitted if the debtor return to better fortunes. The surety of such a debtor is only liable for the pacted part: the remitted part cannot be recovered from him. Unless the creditor was in the dissenting minority, or was absent. If so, his assent might be assumed as in favour of the debtor or other creditors, but not as in favour of the surety, who then remains bound *in solidum*. Unless the returning creditor so to say adopted the pact by only suing his debtor for the unremitted part. Sureties proceeding against the debtor can only recover for the pacted part. What is the "major part" goes by mass, not by number.
29. In these pacts between creditors and a hiding debtor, or his heir, hypothecary creditors are not to be reckoned in, as agreements of chirograph creditors cannot affect them. But whether privileged chirograph creditors are is a moot point. Ulpianus thinks yes, Paulus thinks no. Zeeland follows the view of Paulus that privileged chirograph creditors' rights are not affected by pacts of simple chirograph creditors. Voet appears to coincide with the same view, thinking with Cujacius that Paul followed legal reason, Ulpian a particular Imperial rescript.
30. Those who only have a bare hypothecary right to movables which they do not really hold in possession are in the same position as simple chirograph creditors in the foregoing respect. This is, Voet says, NOWADAYS beyond doubt.

1. A PACT differs from a pollicitation, because a pollicitation is the promise of the offering party only;* but a pact is the consent and agreement of two or more persons, as to the same determination as to giving, or doing, or furnishing anything;†, in which promise there is not, however, any cause of obligation *per se* and in its own nature. In

* "What the Roman jurists termed pollicitation is the offer made by one party for the acceptance of the other."—Sandars, p. 411.

† Sandars, p. 410. D. xlv. 7. 3. Voet, *postea*, 44. 7. 1. *et seq.*

this last respect a pact is different from contracts, which are agreements producing an action from themselves and out of their own nature: *l. pactum* 3, *ff. de pollicitationib.* (D. 50. 12.); *l. 1, § 2. 3, ff. h. t.* (D. 2. 14.). Whether, however, it is a pact or a contract which has been entered into, must be gathered not only from the words but even more from the mind (*mente*) of the agreeing parties: if they have used words adapted to stipulations with the intention of pacting, it will be a pact: *l. jurisgentium* 7, § *quod fere* 12, *ff. h. t.*

2. A pact is either nude or not nude, which latter the commentators also call "clothed" ("*vestitum*"): see *Vinnius, de pactis, cap. 5.* It is said to be nude, because it consists in nude and simple terms or limits (*terminis*) of agreement, only producing a natural obligation, not an action, lest the liberty of the mouth be too much restricted, and the more imprudent be often caught in the nets of words rashly spoken: *l. jurisgentium* 7 *pr. et* § *sed cum* 4, *ff. h. t.* (2. 14.) *l. legem* 10 *C. h. t.* (C. 2. 3.); *l. si tibi* 27. *C. de locato* (C. 4. 65.); *Paulus, sent. libr. 2. cap. 14.* Hence neither from a doubled (*geminato*) pact is an action born, for there is no force in the doubling pact, unless it be required by the law. Nor from a pact which is strengthened by an oath, for an oath is but wont to follow the nature of the "act" to which it is affixed; on general principles. Nor is it in conflict with these general principles that a natural obligation is born from a pact, and an action from a natural obligation: *l. naturales* 10, *ff. de oblig. et action.* (D. 44. 7.); *l. fidejussor.* 16, § *naturales* 4, *ff. de fidejussor.* (D. 46. 1.), for the expression "natural obligation" is taken more widely in those passages, so that it comprehends also that natural obligation which is conjoined to a civil obligation, in which way they are also said to be "natural" children who are at the same time "legitimate," that is, procreated in lawful marriage: *pr. et* § 2. *Instit. de adoption.* (I. 1. 11.). Besides, it is the intention of the juriconsult in the said passages to explain from what signs it can be gathered whether there is an underlying natural obligation. He lays down a double test; in the first place, whether any action is born from what is done (*ex negotio*), in which case there is also an underlying civil obligation, and yet an evident underlying natural obligation. In the second place, whether an exception and a retention of what is paid is competent, in which case there is only a natural obligation, the effect of which is that, as a rule (*in genere*), it causes the "recovery of what is undue" (*condictio indebiti*) to cease: *l. naturaliter* 13. *l. si quod dominus* 64, *ff. de condict. indebiti* (D. 12. 6.). Neither does the *l. nuda* 5. *C. de contrah. et committ. stipulat.* (C. 4. 38.) conflict with these general principles spoken of; there a *litis-contestatio* made by pact is spoken of, and thus an action born from a pact. For it is not there made expressly clear whether it was a nude pact or a pact added to an equitable transaction (*bonæ fidei*), or one fortified by the law or the prætor; so that on the strength of other laws it might fitly be taken to be understood of a part which is not such an one as, according to the general principles

of law, can produce an action. And less still is the contrary to be gathered from *l. dedi tibi* 3, § *quin imo* 4, ff. *de condict. causâ*, for it is not there said that it was found meet, "by pact," that it should be given, far less that it was found meet "on account of a nude pact," but, rather, that it was found meet by that kind of determination (*placitum*) which pertains to contract; for it is added that the action competes which is born "from this contract," the stipulation, namely, of a certain quantity, that is, "condiction." Add *tit. de condict. causa daba*. (*Post*, tit. 12. 4.)

3. A nude pact has also these qualities, that if it be a "releasing" pact, it *ipso jure* annuls a preceding natural obligation, but annuls a civil obligation by means of an exception: § *præterea* 3. *Instit. de exception.* (I. 4. 13.); *l. Stichum aut Pamphilum* 95, § *naturalis* 4, ff. *de solution.* (D. 46. 3.). To this there is this exception, that some pacts favoured by law *ipso jure* annul civil obligations: *l. legitima* 6, ff. *h. t.* (2. 14.), and thus the action of "injury" and the action of theft are *ipso jure* extinguished by pact: *l. si tibi* 17, § *quædam* 1, ff. *h. t.*; also the hypothecary action born from a pact of hypothec: for as it was born from a pact, and was thus a natural obligation, it was also taken away by the contrary pact "that a thing should not be bound by hypothec." This is what the Emperors mean in *l. major* 23. *C. de pignoribus* (C. 8. 14.) when they say that one over twenty-five years of age cannot follow up an agreement of pledge which has been remitted, though it were remitted by pact only, because it is armed with "jurisdiction," that is, by the edict of the prætor, as Gothofredus annotes on the said *lex* 23; and as D. Noodt makes the meaning of this law clearer in his *probabil. libr. 2. cap. 8. num. 1*, by removing the comma or punctuating mark after the word *pactum*. It would have to be otherwise laid down if the pact were not as to the hypothec but as to the principal debt itself,—“that it be not sued for,”—for then, as the principal debt was not extinguished unless by force of an exception, the accessory obligation, also, of hypothec, copying the principal, and ceasing only on account of the cessation of the principal obligation, seemed not to be taken away except by exception: *l. si tibi* 17, § *de pignore* 2, ff. *h. t.* (D. 2. 14.). For as in other cases, also, although a pact is not as a rule *ipso jure* taken away by pact, *d. l.* 95, § 4, ff. *de solution.* (D. 46. 3.), yet if by a precedent civil, and binding, obligation, a pact *not to sue* have been interposed, and again thereafter, a pact that there *can be sued*, the first pact will not be weakened by the second *ipso jure*, but by means of a replication: *l. si unus* 27, § *pactus ne peteret* 2, ff. *h. t.* *Reservatus, accurate 2 variorum*, cap. 6. If any one have promised by pact that he will liberate his debtor from his obligation, and yet have not thereafter in fact (*re ipsâ*) interposed the pact "not to sue," by the Roman law he cannot bring an action of liberation, because on a nude pact an action for the performance of an act is not competent: *l. intra illum* 41, ff. *h. t.* (2. 14.); *arg. l.* 38, ff. *de N. O.* (D. 45. 1.). AND ALTHOUGH BY OUR MODERN LAW the same efficacy is given to nude pacts as to stipulations,

and therefore in this case an action would be given to the debtor, against his creditor, for the granting of the release, yet in this factual case (*in hac facti specie*) it would be supererogatory to have recourse to it. For without any action the matter would be so taken as if a pact not to sue had been interposed and a release made; for if the debtor should, on the first pact for release, contend for the release itself, or otherwise (as is done in factual obligations), for that which it disadvantaged him that the former pact had not been fulfilled, this advantage (*id quod interest*) could not consist in anything else than in this, that the debtor should be free from his obligation. Just as therefore he to whom a release has been legated, although he have an action founded on the testament, most advantageously defends himself by an exception against the heir suing him, *l. liberationem* 3, § *nunc* 3. *l. quod mihi* 22, ff. *deliberat. legat.* (D. 34. 3.); *l. si creditoris* 17 *C. de fideicommissis* (C. 6. 42.); so also here, according to *d. l. 41, ff. h. t. Abr. à Wesel, de connub. bon. societ. tract. 2. cap. 6. num. 25.*

4. But if an obligatory nude pact has been interposed, it will secure, by the civil law, effects not to be contemned (excepting the production of an action); for it can be novated and brought to a *constitutum** and compensated, and the thence arisen natural obligation will admit sureties and pledges and prevent the recovery of what is paid, as we will treat of in their own proper places.

5. Those non-nude pacts are obligatory by which, beyond the simple bounds of the agreement, some force of obligation civilly and efficaciously, extrinsically, accedes. And this either by the pretorian law, which happens in "hypotheo" and "constitutum": *l. si tibi* 17, § *de pignore* 2, ff. *h. t.* (2. 14.), *l. 1, ff. de constit. pecun.* (D. 13. 5.), or by the civil law, as by a pact of donation, *l. si quis argentum* 35. *C. de donation.* (C. 8. 54.), of dowry, *l. pen. C. de dotis promiss.* (C. 5. 11.), of interest due to the state or a banker, or on bottomry-bonds, or due in specie, as oil or grain given by way of *mutuum*, *l. etiam* 30, ff. *de usuris* (D. 22. 1.); *l. frumenti* 12; *l. olei* 23. *C. Eod. tit.* (C. 4. 32.); *l. periculi* 5, § *ult. ff. de nautic. fœnore* (D. 22. 2.); *Nov. 135. cap. 5.* Pacts of this kind are called *legal agreements*: *l. legitima* 6, ff. *h. t.* (2. 14.); or, lastly, because they accede to a contract. As, however, all pacts are not rightly added to contracts, so neither do all added pacts produce an action. For they are either interposed as to those things which are present in the contract, and can be absent from them, and are commonly called "accedings to": these it is not doubted can be sustained when added at the discretion of the contracting parties. Or they are framed concerning those things by which you recede from the ordinary nature of contracts; and neither in that case are they wanting in their own strength, the special nature of the contract which they have according to law remaining in other respects. For which reason mandate and deposit are indeed gratuitous;

* See *post*, 13. 5. 1.

but if it be agreed that an *honorarium* be given to the mandatary for the purpose of remunerating, there will be opportunity for the exaction of the honorarium, and yet, as to the rest, there will be the action of mandate: *l. si remunerandi* 6 in *pr. l. 7, ff. mandati* (D. 17. 1.) *unct. § ult. Instit. Eod. tit.* (I. 3. 26.); and if depositors and depositaries have gone beyond the very well-known limits of deposit, by agreeing that the depositary should return just so much money as was deposited, with the interest of the intermediate time, the law of the contract or the pact will be preserved, the common dispositions of the law as to deposit being followed in other respects: *l. Lucius* 24, *ff. depositi* (D. 16. 3.). Or, lastly, pacts are so adjected that they subvert the very substance of the contracts; and in that case what the law is cannot be laid down by a general definition: for sometimes the whole transaction is thereby vitiated, just as if nothing had been done, when, perchance, impossibilities are included in a pact: *l. non solum* 31, *ff. de oblig. et action.* (D. 44. 7.); sometimes, the principal transaction holding good, the added pact is void and useless, and can be neglected with impunity, as, for instance, if it were agreed, in a deposit or a precarium (loan re-exigible at will), that it would not be allowed to recover within a certain time the deposit or the thing lent at will: *l. 1, § si deposuero* 45, 46, *ff. depositi* (D. 16. 3.); *l. cum precario* 12, *ff. de precario* (D. 43. 26.). Sometimes the principal transaction itself is charged, so that by force of a pact adjected against the substance, it passes in another species of transaction; which is the case in a purchase entered into with a pact added as to not paying the purchase amount, in which case it is considered to be a donation: *arg. l. ult. ff. pro donato* (D. 41. 6.) joined to *l. cum in venditione* 36. *si quis donationis* 38, *ff. de contrah. emp.* (D. 18. 1.). As also in the case of a donation *mortis causâ* with a pact added that it should in no case be revoked: this is then held on account of such addition as another donation, *inter vivos*: *l. ubi ita donatur* 27, *ff. de mortis causa donat.* (D. 39. 6.).

6. But assuming the validity of the "added (adjected) pacts," their power of producing an action is not on that account forthwith to be assumed; but only if they were adjected in immediate connection (*in continenti*) to *bonæ fidei* transactions; in which case they are both said to shape an action, and that an action from them is competent: *l. jurisgentium* 7, § *quinimo* 5, *ff. h. t.* (2. 14); *l. in bonæ fidei* 13, *C. h. t.* (2. 3.): not in the sense that a certain new and nominate action thence arises, but rather that as an action is born from the contract itself, which from the nature itself of the contract was not intended to recover that which is the object of the pact; the action now takes form from the pact itself and is rendered suitable for recovering that which was agreed on by the pact. Take the case of an estate sold to an adjoining neighbour on condition that the buyer grants to the seller a servitude, through the estate sold, to another contemninous estate belonging to the seller; the *actio venditi*, regarding the sale by itself, is invented for the purpose of

the seller's obtaining the price, with interest for delay, but not that he secure the constituting of the servitude; yet as that has been agreed upon by the pact added in *continenti*, the *actio ex emto* will also legally be applied to obtaining the imposition of the servitude. The same is the law as to other similar matters: *l. qui fundum* 75, *ff. de contrahend. emt.* (D. 18. 1.).

7. But if in a transaction *stricti juris* a part has been added immediately or at an interval (*ex intervallo*), it is inefficacious to produce an action, or to shape one. Hence if ten being given as a mutuum it is pacted that eleven be restored, or ten with interest, neither can the eleven be sought, nor the interest included in the pact, but only the ten: *l. rogaste* 11, § *si tibi* 1, *ff. de rebus creditis* (D. 12. 1.); *l. quamvis* 3. *C. de usuris arg. l. in bonæ* 13. *C. h. t.* (C. 2. 3.). Nor does it tend to the contrary that pacts are said to be contained in a stipulation: *l. lecta* 40, *ff. de rebus creditis* (12. 1.); *l. item* 4, § *ult. ff. h. t.* (2. 14.), for pacts are in a two-fold way said to be contained in a stipulation, either from the side of the plaintiff or of the defendant: whence, when the jurisconsult said in *l. jurisgentium* 7, § *quinimo* 5, *ff. h. t.*, "pacts agreed on are included in *bonæ fidei* legal proceedings," he added, but that this is to be so taken that if they followed immediately "they are also included on the side of the plaintiff," intimating thereby that they could also be on the side of the defendant, then thus not producing an action, but only an exception beneficial to the defendant. When therefore in the said *l. 40.* and the said *l. 4.* pacts are said to be contained in a stipulation, that is to be taken as meaning that they are soon the side of the defendant; which is also dictated by the very nature of the pacts set out in each of these "laws"; since each is not obligatory but releasing, not interposed for the benefit of the creditor but for the sake of relieving the debtor, lest, namely, he should be forced to return the capital before he has paid the interest, *d. l. 4.*, or lest he should be immediately compelled to make restitution of the whole capital as he had in the beginning promised, but only on the annual, biennial, triennial day: *d. l. 40.* So that in neither case could there be found the fit terms for producing an action from the pact. Nor do the words trouble us in *med. d. l. 40.*, "and if, as he thought, the pact only availed for an exception (although a different view obtained), yet the contract of interest did not gain force *ipso jure*," &c., for it does not follow thence that an action is given on a pact when the suitable limits of the action on a pact in the said *l. 40.* are not found as stated, but the rather does it show that there seemed to have been a difference of opinion among the jurisconsults, some of whom thought that releasing pacts of this nature added to a stipulation and a mutuum did not stay an obligation *ipso jure* but by force of an exception: others, on the contrary, that an obligation was diminished *ipso jure* by such an adjoined pact: thus Ulpian laid down in *d. l. 11*, § 1, *ff. de rebus creditis* (12. 1.), "if I give you ten on condition that you return nine, I do not *ipso jure* owe you more than nine." Or else the jurisconsult wishes to

convey in the said l. 40. that although it would be true in other cases that a person is not *ipso jure* safe by virtue of the pact, but by virtue of the exception founded on it, yet that in the species of factual obligation, i.e., "to do," there advanced, the debtor would be *ipso jure* protected from the obligation of interest, as the obligation of interest would not be of force *ipso jure*: because the reason of giving interest is wanting, viz., delay, "for he is not," he says, "in delay from whom money cannot be recovered on account of an exception"; and thus it would be absurd that an obligation should arise without any cause of obligation. It would be more absurd that a defendant should be defended by an exception who could not be summoned for the interest by any action, for an exception at least pre-requires an action efficacious *summo jure*: an action requires an obligation, an obligation requires delay (*mora*), to found interest, which there was not in this instance on account of the postponement of payment in the later pact. Less still is l. *si unus* 27, § *sed si stipulatus* 6, ff. *h. t.* (2. 14.) opposed: for there Stichus does not efficaciously proceed on a pact, but on a stipulation. That this may be more clearly seen it must be borne in mind that in the whole § 6 there is no treating about an *obligatory* pact, but a *liberating* pact, by which either wholly or partly there was taken away the obligation which had arisen "*ad Stichum aut decem*." Wholly, if the pact had simply said "that ten be not recovered," for the exception of the pact would have been advanced as a whole against one proceeding for Stichus or the ten: "because as by the payment and recovery and acceptilation (feigned payment) of one thing the whole obligation is settled, so also by a pact entered into as to not recovering one thing, the whole obligation is discharged." Partly, if it had been so agreed "that not ten but Stichus should be given": because in that case the liberating pact was limited to ten, and it was nominately provided that it should not extend its force to impede the recovery of Stichus. Therefore there is subjoined "that you can efficaciously proceed for Stichus, without any exception being opposed"; which exception could indeed have been opposed if ten had been prayed for but not Stichus, in which respect the obligation by way of stipulation had not been weakened by the subsequent pact. And this is the same which is treated of by Paulus, the author of the said l. 27., in l. *si emptio* 4, ff. *de rescind. vend.* (D. 18. 5.), where he says, "if a purchase have been contracted, say of a gown or of a dish, and the seller had pacted that 'the sale of one or other should not remain,' I think that the obligation would be discharged in respect of only one thing." For the words that "of one or other the sale should not remain" are not the very words of the interposed pact, but nevertheless constitute the formulary of the pact: for it would be in that way entirely obscure and inept, nor would it be clear which of the two things was free from the obligation, but they would rather presuppose other words adapted to bring about "that of one or the other the sale should not remain"; what that phrase, what that formula should be, by which that would

be done, is to be gathered from the said *l. 27, § 6*: viz., when it is not simply Pacted "that the gown should not be recovered," but when it was more fully agreed "that not the toga but the dish should be recovered," or that "there should not be a sale of the gown but of the dish": this explanation being had recourse to, there is no difference between the said *l.* and *l. 27, § 6*. The force and utility of this liberating pact by which it is agreed "that not ten, but Stichus should be given" consist chiefly in this, that if Stichus die, Stichus having alone remained over in the obligation, the debtor is wholly liberated; but he would not be liberated if the alternative obligation as to the ten, or Stichus, had remained, in which case not the death of one, but only the death of each thing would have relieved him from the necessity of furnishing it: *l. arbitratia 2, § Scaevola 3, ff. de eo quod certo loco* (D. 13. 4.); *l. cum is 32. pr. ff. de conduct. indeb.* (D. 12. 6); *l. si in emtione 34, § pen. ff. de contrah. emt.* (D. 18. 1.). Nor does it militate against this opinion that an adjection of place for payment being made in a mutuum, in a stipulation, in a legacy, it may seem as a pact adjoined to a contract, to found the action "as to that which was given in a certain place being repaid there," according to *l. si heres 5. l. 6. 6. 7, § 1, ff. de eo quod certo loco* (D. 13. 4.). For so far from doing so, it seems, if we follow more and sure reason, that it is rather against the pact, on pretorian equity, that the action "as to that, &c., *supra*," may be given: for when a plaintiff suing a defendant in another place than that adjoined, could be in strict law repelled by this exception on account of his not suing in the place where it was due, and therefore the adjection of place benefited the defendant by his excepting, the prætor ordered that this exception given by the strict law should remain passive, an equitable action being elsewhere allowed: *l. 1, ff. de eo quod certo loco* (D. 13. 4.). In the same way you will not rightly conclude from the fact that a prorogation of jurisdiction [see Jurisdiction, *ante*, Pt. II.: *Trans.*] is made by pact, and that thereby the power arises of suing before another judge, according to *l. pen. C. de pactis* (C. 2. 3.), that an action is "formed" on the pact, since the action does not thereby acquire any new form, nor suffer any change; for the plaintiff neither prays nor recovers anything more or less, nor anything else, before the judge competent "by prorogation," than he would have obtained if he had proceeded before him who was competent without any prorogation. Such a change, however, is required before an action can be said to be "formed," or to receive a new form by pact. Slighter, in conclusion, are the arguments which are sought from *l. debitori tuo 7. l. petens 27. C. h. t.* (C. 2. 3.); *l. cum res filio 22. C. de donation.* (C. 8. 54.); *l. 7, § 8, ff. de dolo* (D. 4. 3.); since they partly refer to actions arising on stipulations which are added for the purpose of confirming a pact; partly concerning pacts which, by subsequent "giving," or "doing," had passed into contracts of an innominate nature, and thus produced actions of fraud, or of specially couched formulæ (*præscriptis verbis*). Consult Vinnius, *de pactis*, cap. 10.

8. If pacts are added at an interval (*ex intervallo*) to transactions *bonæ fidei* and not *stricti juris*, it must be inquired whether they are pacts adding to or detracting from. Pacts adding to, are those which are interposed not as to the substantial parts of any contract, but as to adminicular parts, such as relate to giving earnest-money, securities, evictions. Detracting pacts are those which, as to what belongs to the substance of the contract itself, change something or do something, so that there seems to be a part recession from the former contract, and a new contract entered into: *l. pacta conventa* 72, *ff. de contrahend. emp.* (D. 18. 1.); *l. jurisgentium* 7, § *adeo autem* 6, *ff. h. t.* Detracting pacts "form" an action, since they seem to make a new contract, the first one ceasing. But adding pacts do not lie on the side of a plaintiff, nor do they "form" an action, but only produce an exception: *d. d. l. l.* See *Rævardus, libr. 2. varior. cap. 1. pag. mihi 540 et seqq.*

9. If these distinctions as to pacts "forming" and not forming an action were not perfectly necessary for the proper understanding of the Roman law, and of laws which without this being known would be partly obscure and partly savour of hardship, they might really, as far as the practice of the Court goes, be passed over in silence, since it is now perfectly well known, and everywhere received, that from nude pacts entered into with a serious and deliberate mind, an action is born, equally as from contracts, and much more so if they were added to contracts whether *bonæ fidei* or of strict law, whether this happened immediately or at an interval: *Jacobus Coren, observ. 13. num. 8. 9. 10; Lamb. Goris, adversar. tract. 1. cap. 4. num. 20. 21; Gudelinus, de jure novissimo libr. 3. cap. 5. circa finem; Grotius, manud. ad jurispr. Holland. libr. 3. cap. 1. circa finem; Wesel, de connub. societate, tract. 2. cap. 6. num. 25; Groenewegen ad d. l. 10. C. h. t.; Parens p. m. Paulus Voet, ad pr. Instit. de obligationum; Vinnius, tract. de pactis, cap. 7.* This must not so much be traced to the canon law, which did not lay down more than the civil law had done, viz., that pacts were to be observed, and that it was a serious thing to break faith: see *C. 1. extra de pactis* and *l. 7, § 7, ff. h. t.; l. 1, ff. de constit. pecun. 13. 5.; Fachesius, libr. 2. controvers. cap. 100*: but rather must it be traced to this fact, that many nations thought that good faith and the great exactness of the law of nations in preserving those things which pleased them were to be preferred to the over-subtleties of the Roman law, which distinguished too anxiously between pacts and stipulations, and laid down, as it were, snares of words; so that you might say that those laws were more couched in word than in deed. Simon van Leeuwen has, therefore, fallen into an error when he asserts that it has been received in practice that in a nude pact an action is not given; the clear cause of error on his part consisting in this, that he rashly confounded nude pacts with that agreement or security which had not an expressed cause of debt. It is no doubt true that the cause of debt ought to be expressed or at least proved, so that there may be an exaction of that which is said to be

owing; but this has no reference to the question whether an action can be given on a nude pact. Nor is it to be doubted that any one can by nude pacts promise that he will be surety for another, or will give a pledge, that he will count out a mutuum, will grant a commodatum, and many other like matters; from which promise on a nude pact it is certain there could have been no action according to the Roman law; but it is equally beyond doubt that NOWADAYS an action can as rightly be instituted on a nude pact as on a stipulation.

10. Besides the first division of pacts into nude and not nude, there is also another division into public pacts and private. The latter are those which are entered into with regard to the things and transactions of private persons. The former those which are interposed as to public transactions; as, for instance, when leaders in war contract among themselves concerning truces or peace: *l. conventiones* 5, *ff. h. t.*, which pacts of generals are called "promises": nor do they bind unless approved by the people, from which time they begin to be called "treaties." As to pactions, promises, treaties and many examples of the triple species of treaties gathered from antiquity, see *Carolus Sigonius, de antiquo jure Italise, libr. 1. cap. 1.* When such public pacts are entered into they are not only to be observed if they have been entered into with free peoples, but also if they have been entered into with rebels, robbers, heretics, pirates: because all these have a community of rights and of nature, as being men, and are therefore such as the dictates of reason lay down should have observed towards them, faith once pledged. See *Vinnius, tract. de pactis, cap. 3.*

11. Further, some pacts are concerning a thing or real, others concerning a person, or personal: *l. juris gentium* 7, § *pactorum* 8, *ff. h. t.* Those are said to be "real" which benefit heirs and sureties: *l. et heredi* 21, § *ult. l. ult. ff. h. t.* (D. 2. 14.); *l. exceptiones* 7, § 1, *ff. de exceptionibus*: so that any one can even pact for all his heirs generally, and the laws also allow you to benefit one of many heirs by a liberating pact: *l. avus* 33, *ff. h. t.*, even to acquire an obligation for one by an obligatory pact if it consist in *doing*, but not if it consist in *giving*: for example, the stipulations of which Venulejus said that when we stipulate that anything *shall be done* even the person of one heir is rightly included, but if we stipulate that there shall anything be *given* we cannot acquire it for one of our heirs: *l. continuus* 137, § *ult. ff. de verb. oblig.* (D. 45. 1.); *Gomezius, variar. resolut. tom. 2. cap. 11. num. 15.* See *Donellus, ad d. l. 38, § 17, ff. de verb. oblig. num. 42 et seqq.* BUT AS NOWADAYS every one can pact and stipulate for another, certainly even for a stranger, there is no longer any reason why you cannot pact also for *giving* to one heir: *Gomezius, d. num. 15. in med. Groenewegen, ad l. 137, § ult. ff. de verb. oblig.* (D. 45. 1.) No one, certainly, can by pact provide that one of many heirs who are to succeed him shall be bound to give in *solidum*: as the law rather favours an acquisition for, or the liberation of, heirs, than their obligation: *l. si quis ita* 56, § 1, *ff. de verb. oblig.* (D. 45. 1.); *Lamb.*

Goris, adversar. tract. 3. cap. 8. num. 3 et seqq. ; Mævius, de arrestis, cap. 8. num. 57 et seqq. ALTHOUGH GROENEWEGEN IS OF A DIFFERENT OPINION: *ad d. l. 56, § 1, ff. de verb. obligat. (D. 45. 1.)*. Besides it does not prevent a pact being "real" because in the pact no mention of a certain person is found: for whether a pact is real or personal is to be determined equally from the intention as from the words of the contracting parties; for often a person is mentioned in a pact not that the pact may be personal, but that it may be shown with whom you pact: *d. l. 7, § 8, ff. h. t.* Examples are to be found in *l. late pactum 40, ff. h. t. (D. 2. 14.)*; *l. si necessarias 8, § pen. ff. de pign. actione (D. 13. 7.)*.

12. On the other hand, pacts of sureties, although generally framed as "to not suing," will not however advantage the principal debtor, nor the other co-sureties, because it is not to the interest of the pactor that there shall be no recovery from them, *l. fidejussoris 23, ff. h. t. (D. 2. 14.)*; *arg. l. heredem 2, ff. de liberat. legatâ (D. 34. 8.)*, unless it were nominally included in the pact that it should both benefit the co-sureties and the defendant: in which case the exception of fraud would help them as against the plaintiff: *l. idem in duobus 25, § ult. l. 26, ff. h. t. (D. 2. 14.)*; *arg. l. in duobus 28, § quod reus 1, ff. de jurejurand. (D. 12. 2.)*: and the same would hold if any one were a surety *in rem suam*, as for his own procurator: or a partner for a partner in anything relating to the partnership: since it is to their special advantage that the defendant is aided by the exception: *l. 24. l. 25, ff. h. t. Vinnius, de pactis, cap. 16. num. 8. in fine.* On which ground even the pact of one co-defendant or banker benefits the other co-debtors or bankers, if they are partners: *l. sed si fidejussor. 24. l. 25, ff. h. t.* SINCE OTHERWISE IT IS RECEIVED PRACTICE both as to pacts and stipulations, that every one must pact for himself and not for another: *d. l. fidejussoris 23, ff. h. t.*; so much so, that if any one has pactured that "there shall be no recovering either from him or from Titius," that pact would not benefit Titius, although he became the heir of the pactor: because what is void from the beginning cannot by subsequent action be confirmed: *l. si tibi 17, § si pactus sim 4, ff. h. t.*: but a son in his father's power can rightly pact for his father: *d. l. 17, § ult. l. 18. l. 19, ff. h. t.*: and a father can, also, for his son retained in his power, at least so far that the exception of fraud would benefit the son: *l. et heredi 21, § nos autem 2, ff. h. t.*: also for his emancipated son, whenever his father considers him as his future heir: *l. avus 33, ff. h. t.*; but not if he have been pactured with not as heir but as a stranger, although afterwards he became an heir: *d. l. 17, § 4, ff. h. t.* See more as to not pacting for another in Vinnius, *de pactis, cap. 15.* BUT NOWADAYS these fine distinctions may be rightly considered of no force, since now every one can stipulate and pact for another as has been said, and as Groenewegen shows by reference to a long series of commentators: *ad § alteri 19. Instit. de inutilib. stipulation. (I. 3. 19.)*.

13. Those are called personal pacts which only benefit the pactor, and not his heirs, and much less purchasers, donees, legatees, and other

similar individual successors: *d. l. jurisgentium* 7, § *pactorum* 8. *l. si tibi* 17, § *si quis* 3. *l. idem in duobus* 25, § 1, *ff. h. t.* (D. 2. 14.). Paulus does not contradict this in *d. l. si tibi* 17, § *pactum* 5, *ff. h. t.*; for although he says that "the pact of the seller benefits the purchaser, not only if it be framed in *rem* but also if it be framed as to a person," yet it does not follow from that that the personal pact of a seller also prevails as against a purchaser: because a pact framed as against a person is not to be confounded with a personal pact; for it may be framed as against a person and yet not be personal, but be only so framed to demonstrate with whom the pact has been made: *l. jurisgentium* 7, § *pactorum* 8, *ff. h. t.*

14. Nor do these personal pacts benefit sureties either, *l. nisi hoc actum* 22, *ff. h. t.*, provided they have by the new law renounced the "benefit of order": if, however, they have not done so, the accidental pact will also benefit them: for the creditor took away from himself by pact the power of excussing the principal debtor, nor can the creditor efficaciously sue the surety unless the principal debtor is excused: otherwise he will be excluded by the exception of "order": *Vinnius, de pactis, cap. 13. num. 4, 5.* Nor should any one think that the creditor is not legally at liberty so to enter into a contract with his debtor "not to sue him" that this should yet not benefit the surety also: because thereby one might think the creditor would bring it about that he could not thereafter cede to the surety efficacious actions against the principal debtor; to which cession, however, he is bound before he can obtain payment from the surety: *arg. l. Stichum* 95, § *pen. ff. de solutionibus* (D. 46. 3.). For it must be considered that a mandatary ought equitably to make cession of action to a mandator, although it have not been so agreed from the beginning, because without cession the mandator would not have an action against the debtor whom he had directed should be trusted; since he had neither contracted with him nor *quasi* contracted with him, nor, on payment, freed his debtor *ipso jure*; for he was more carrying on his own business than the debtor's: *l. si quis alicui* 27, § *ult. l. 28, ff. mandati* (D. 17. 1.); and *l. 95, § pen.* treats of these mandators and mandataries. To a surety must likewise be ceded actions against co-sureties, the benefit of cession of action being put forward for that purpose; for without a cession of action there would, in such case, also be no recourse against co-sureties: *l. fidejussoribus* 17, *ff. de fidejuss.* (D. 46. 1.). The necessity cannot, however, be imposed on a creditor to cede actions against the principal debtor: because that was neither so agreed from the beginning (and a stipulation between creditor and surety is one of strict law), nor is there any underlying reason of necessity, for the surety is abundantly secured as to indemnity, without cession of action; inasmuch as by an action of mandate or of work done, he can recover from the principal debtor what he has paid for him: § *si quid autem* 6. *Instit. de fidejussor.* (I. 3. 20.); *l. ex mandato* 20, § 1, *ff. mandati* (D. 17. 1.); *Pacius, enantioph. cent. 1. num. 95.* Besides what cannot directly benefit a surety may still be useful by

means of circuitous means (*ambagibus*), for when the surety is sued by the creditor he may desire the principal debtor that he shall defend the suit in his own name, or in a procuratorial name, and so he can defend himself by a personal exception of pact: *l. idemque* 10, § *pen. ff. mandati* (D. 17. 1.): unless it is clear that the surety had interposed with the intention of donating, or was in any way so bound that he was without recourse against the principal debtor: *arg. l. si quis reum* 5, *ff. de liberat. legata* (D. 34. 3.); *Zoezius, ad lit. ff. de exceptionibus*, num. 23.; *Brunne-mannus ad d. l. 10, ff. mandati*, num. 15 *et seqq.* If the principal debtor refused to undertake this defence, he would have to impute it to himself if, summoned by a surety forced to pay, for the recovery of what the surety so paid, he did not derive, in the end, any benefit of the pact agreed on. It would be different if the principal debtor were only protected, not by pact, but by legacy of the creditor specially legating a release to such debtor: for then if the heir of the creditor had sued the surety and in any way obtained what was due, he would be bound by the action on the testament, lest otherwise the legacy should be void, and the liberality gained by the last will of the deceased should perish: *l. heredem* 2, *l. si quis reum* 5, *ff. deliberat. legat.* (D. 34. 3.). If it be uncertain whether a real or a personal pact has been interposed, in a case of doubt it should be rather supposed to be a real pact, since every one is believed to have not merely contracted and pactured for himself, but also for his heirs: *l. si pactum* 9, *ff. de probation.* (D. 22. 3), *l. veteris* 13. *C. de contrahend. et commit. stipulat.*: *l. stipulatio ista* 38, *ff. de verb. obligat.* (D. 45. 1.), *arg. l. jurisgentium* 7, § *pactorum* 8, *ff. h. t.* *Lamb. Goris, adversar. tract.* 3. *cap.* 2. num. 11, 12. *Costalius, ad l. 7, § 8, ff. de pactis.* *Menochius, libr. 3. præsump.* 47.

15. The division of pacts in express and tacit must also not be overlooked: express, which are sufficiently known of themselves, and tacit, which are gathered from presumptions and signs. For which reason, when furniture has been brought and carried into an urban estate, it is taken as agreed by that tacit pact that the furniture is bound in hypothec for the rent, *l. item* 4, *ff. h. t.*; *vide tit. in quib. causis pign. tac. contrah.* (*post, tit.* 20. 2.); and interest being taken by a debtor for a future period of two years or longer time, a tacit agreement is understood that the capital will not be repayed within that time: *l. qui in futurum* 57, *ff. h. t.*, *l. palum* 2, § *non male* 6, *ff. de doli mali et met. except.* (D. 44. 4). In like manner, if an heir sell an inheritance, although notwithstanding such sale he can be sued by the estate creditors, yet if they have begun to sue the purchaser, and he has willingly defended the actions instituted, a tacit pact is thereby born that the creditors should not thereafter recover from the seller: *l. post venditionem* 2. *C. h. t.* (2. 8.) *Groenewegen add. l. 2.* *Groenewegen*, however, makes this mistake in common with others, that he thinks that such tacit pact will not apply if a creditor has begun proceedings with a purchaser of whose insolvency he was not aware. For neither is the poverty of any one an impediment to credit being given

him, nor does ignorance excuse, for no one ought to be ignorant of the condition of him with whom he contracts, and to whom he of his own free will gives credit without any compulsion: *l. qui cum alio* 19, *ff. de regul. jur.* (D. 50. 17.). For that he who, though able to obtain "separation of the goods" of the deceased from the goods of the heir, trusted to the heir, whom he believed to be solvent, cannot thereafter pray the separation of goods, because by his election he has prejudiced himself, and ought to impute that to himself: *l. 1, § illud sciendum* 10. 11. *et § si quis pignus* 15, *ff. de separationibus* (D. 42. 6.); and this view is supported by what is elsewhere laid down as to the delegation of a poor debtor, and as to an action sold against a less suitable person, viz., that it suffices that one selling or delegating a debtor, furnished that particular debtor; he was not bound to furnish a richer. Equally is there a tacit pact included in the return of a pledge, or a chirograph, that the pledge being returned, the principal debt (although it is not regarded as so specially agreed) shall not be prayed unless it is otherwise proved: that the thing shall not remain longer bound in pledge for the debt does, however, appear agreed on: *l. cum ex causâ* 9 *C. de remissione pignor.* (C. 8. 26.); *l. 1, § 1, ff. deliberatione legata* (D. 34. 3.); *l. postquam* 3, *ff. h. t.* By the very restoration of the security or of the chirograph it was, it seems, tacitly agreed that the debt should not be recovered, and that there be no exaction of the pledge: *l. Labeo* 2, § 1, *junct. l. si tibi* 17, § *de pignore* (D. 20. 1.); 2, *ff. h. t.* (2. 18.) *l. liberationem* 3, § *Julianus* 1, *ff. deliberatione legata* (D. 34. 3.) *l. creditricem* 7. *C. de remiss. pignoris* (C. 8. 26.) *l. qui chirographum* 59, *ff. de legatis* 3. *arg. l. si chirographum* 24, *ff. de probationibus* (D. 22. 3.). If, however, a debtor holding the chirograph asserts that it has been returned to him, but the creditor denies that he had returned it, and therefore that the debt was discharged, the burden of the proof will seem to be on the debtor, as on one who affirms a thing, and alleges an exception of tacit pact, *arg. l. 1, ff. de exception.* (D. 44. 1.) *l. asseveratio* 10. *C. de non num. pec.* (C. 4. 30.), especially as no one is presumed, in a doubtful case, to wish to throw away what is his own: *Neostadius, curia suprem. decis.* 88 *vers. his vicissim*. If many chirographs have been written as to the same debt and given to the creditor, the restoration of one will not seem to found a pact "as to not suing," because the debt could still exist on the other chirographs; it thus rests with the debtor to prove that the one chirograph was restored with the intention that the force of the other chirographs should also cease: *arg. l. ult. ff. de his quæ in testament. delentur* (D. 28. 4.). Add to this that a remission of a debt contains a donation, which donation is not to be presumed in case of doubt, because to donate is to lose, and no one is believed to wish readily to throw away what is his own, as long as there is room for another presumption: *arg. l. filius familias* 7, *ff. de donationibus* (D. 39. 5.), joined to *l. cum de indebito* 25, *ff. de probat.* (D. 22. 3.) See *Augustin. Barbosa, axiomat. juris frequent.* 112. *verbo jactare*. Thus it is far rather to be presumed that the

creditor restored the one tablet to the debtor because he thought that, as he retained the other tablets at his own house, he (the creditor) could easily prove his claim: *Vinnius, de pactis, cap. 12. num. 13. in fine et num. seqq.* But if you take the case of but one chirograph, and many debtors on it, and the chirograph is returned to one, it liberates him by pact, but not the others: and that not only on the principles of the Roman law, by which one could not pact for another either expressly or tacitly (*arg. l. si tibi 17, § si pactus 4, ff. h. t. Vinnius, d. cap. 12. num. 13. et cap. 16. num. 8.*), BUT ALSO BY OUR MODERN LAW, by which, although one was not prohibited from stipulating or pacting for another, as before said, yet, in a case of doubt, he is believed to have pacted for himself, and not for another, and to have wished to transact business for himself rather than for another, especially if it did not advantage him to whom the chirograph is restored that another should be liberated.

16. Any transactions which are honest and possible, can be made the subject of pact; not those which are contrary to public law, and which cause the public loss: *l. jurisgentium 7, § si paciscar 14. l. jus publicum 38, ff. h. t.* I have described in the title "On Justice and Law" (*ante, p. 1.*) what "not impossible" are. Nor should they be foolish and inept, as for instance that valuable clothes and other ornaments should be buried with one in a sepulchre: *arg. l. servo alieno 113, § ult. ff. de legatis (D. 30. 3.) 1 l. ult. § ult. ff. de auro argento etc. legatis.* Nor what is base or to be reprobated, offending good morals, or inviting to crimes: since these are all civilly viewed as "impossible": *l. ult. C. h. tit. arg. l. filius 15, ff. de condit. institution. (D. 28. 7.).* Such also are those by which it is agreed "that no fraud shall be done in future," or that impunity shall favour future delicts, *l. si unus 27. illud nulla 3. et 4, ff. h. t., l. si a reo 70, § ult. ff. de fidejussor. (D. 46. 1.);* also pacts framed as to the future succession of a certain third person still living: this contains the wish to seek after his death, and is full of the most sad and dangerous results. Or pacts taking away the power of testating; or at all events containing a base haste and solicitude as to another's inheritance. Wherefore such pacts neither take away nor diminish the free faculty of testating of him as to whose inheritance the pact is made while he is still alive, even if he had himself given his consent to pacts of this nature: *l. pactum quod dotali 15. l. ult. C. h. t. (C. 2. 3.):* nor do they give any right to those pacting, but rather do they render the pactors unworthy of the inheritance if they acted without the knowledge of him as to whose inheritance the agreement was made: *l. aufertur 2, § ult. ff. de his quib. ut indignis (D. 34. 9.); l. donari 29, § ult. l. 30. ff. de donation. (D. 39. 5.).* Therefore no right accrues to the covenanting parties from an agreement by which two persons pact with each other that he who lives the longest shall obtain the goods of the other, unless this were agreed amongst soldiers: *l. licet inter 19. C. h. t. (C. 2. 3.).* And it is the same if there is no reciprocal contract; but if one, only, pact that he shall succeed him with whom he pacts, he himself not

holding out to the other any hope of succession, *l. hereditas* 5. *C. de pactis conventis* (C. 5. 14.); *l. pactum quod* 15 *C. h. t.* (C. 2. 3.); or if any one renounces the inheritance of another, *l. pactum dotali* 3. *C. de collatione*. (C. 6. 20.), although there even concur the consent of him as to whose inheritance the agreement is made, yet it will not be valid, because the inheritance is here neither taken away nor transferred by testament nor by law, but by pact only: *d. l. 5. C. de pactis conventis* (C. 5. 14.). But if a pact be entered into between two, as to the inheritance of a third person, and the third party be proved to have consented to it, and have not afterwards changed his will, it would rather be considered that the future agreement between the pactors should hold: *l. ult. in fine C. h. t.* (2. 3.); *Ant. Faber, Cod. libr. 2. tit. 3. defin. 10. Eberhardus, consil. 48. post med. Carpzovius, defin. for. part. 2. constit. 35. defin. 19. Hartmannus, Pistor. libr. 4. quæst. 1. num. 29.* AND ALTHOUGH NOWADAYS there seems a receding everywhere from this provision of the Roman law, inasmuch as you can legally deal by dotal pact as to the relative rights of spouses between each other, and of the spouses to the goods of a third person, or of a third person as to the goods of spouses, as I have more fully treated in *tit. de pactis dotalibus* (post, tit. 23. 4.); yet, beyond the case of dotal pacts, and those which are adjected by the custom of Holland to hereditary divisions (as to which see *tit. famil. ercisc.*, post, tit. 10. 2.), even now agreements made as to the inheritance of a certain third person, or of the pactors themselves, continue to be disapproved of by us, in consonance with the principles of Roman law above laid down: in so far, at least, that they have no effect, whether they contain a renunciation of the succession (*Abrah. Wesel, de connub. bonor. societ. tract. 2. cap. 6. num. 15. 16.*), or whether they transfer the inheritance. For this reason, when a pact was interposed between a second and a third brother, the first-born being alive and having the estate, that the one should, on the death of the first dying, have the estate, and the other receive a thousand aurei or a diminished price for the feudal estate, IT WAS DECIDED, when the estate devolved to the second brother on the death of the first dying, that he should keep it by his own prior right, and not be bound to his brother in a hundred aurei; the penalty of indignity not being imposed, although some even allow this according to *d. l. ult. C. h. t.*: *Neostadius, Curiss supr. decia. 112; Respons. Jctorum Holl. part. 2. cons. 288, quod occurrit pag. 377. et part. 4. consil. 30.* And if any one has promised another by pollicitation, or pact, that he would leave him his inheritance or a legacy, and did not afterwards keep his promise, no action on the pact compels to him against the deceased's heirs, whether for obtaining the inheritance, or the legacy, or "that which it advantageth him" (*id quod interest*); *Carpzovius, defin. forens. part. 3. constit. 5. defin. 22.* There are some, however, who contend that mutual agreements between brothers and others that the last survivor should succeed to those dying first, should be upheld if they are framed, not as pacts transferring the inheritance for the future,

after death, but as firm and irrevocable donations *inter vivos*, the execution, only, and fulfilment of which remains suspended until death: this opinion is deservedly disapproved, as being more founded on words than on reason, by Peckius, *de testamentis conjug. libr. 1. cap. 8. num. 4*; Fachineus, *libr. 5. controvers. cap. 85*. See Andr. Gayl, *libr. 2. observ. 126*, and many others cited by Sande, *decis. Frisic. libr. 4. tit. 5. defin. 19. quæst. 1*; also discussed at length by Hartmann, *Pistor libr. 4. quæst. 2. 3*. And that the pacts of certain illustrious families as to succession in respect of certain particular things are to be upheld, see] discussed at length in Andr. Gayl, *d. libr. 2. observ. 127*. Peckius, *d. libr. 1. cap. 8. num. 5*; and the whole subject of pacts as to the acquisition or non-acquisition of the inheritance of one living is very fully discussed by Hartmann, *Pistor. libr. 4. quæst. 1. 2. et multis seqq.*; Abrah. à Wesel, *de connub. bonorum commun. tract. 2. cap. 6.*; Zoesius, *ad Pandect. h. t. n. 21. ad n. 54.*; Francisc. de Barry, *de succession. libr. 2. tit. 3. & 4.*; Vinnius, *de pactis, cap. 19*.

17. But what has been hitherto said does not prevent an agreement being entered into as to the inheritance of a third *uncertain* person, although alive; for it is allowed to contract a partnership "of all goods universally," in which partnership it is agreed that also future inheritances in any way coming to one of the partners are included: § *manet* 4. *Instit. de societate* (I. 3. 25.) *l. ex vero* 3, § 1, *ff. pro socio* (D. 17. 2.). Moreover it is not forbidden, BUT IS DAILY PRACTICE, to pact as to the estate of one already deceased, whenever the deceased has decreed that though suspended conditionally, from a fideicommissary cause, they shall be restored, so that the fideicommissary here by means of a pact remits the suspended, and therefore the uncertain, hope of succession: *l. 1. l. cum proponas* 16. *C. h. t.*; for in that way no new desire to long for death is brought about, but such desire is rather removed which may seem to have hitherto existed by virtue of the suspended fideicommissary right: *l. fideicommissio* 11. *C. de transact.* (C. 2. 4.).

18. Among dishonourable agreements is also included that by which the patron of a cause pacts with the client as to a share of the suit. For although compromise is permitted between a plaintiff and defendant as to a doubtful suit, because an end is thus placed on dissent, and strife is banished, yet since the purchases of others' lawsuits were considered odious and reprehensible, *l. litium* 15. *C. de procuratoribus* (C. 2. 13.), *l. si remunerandi* 6, § *ult. l. 7. mandati* (D. 17. 1.), and as by a pact, as to a share of the lawsuit, between the client and the advocate, a lawsuit is not assuaged, but the licence of calumnation is rather to be deservedly the more feared on account of the hope of greater profit, and as in the most unjust causes the defender is also more unjust, such a partnership of future emolument was with the best right reprobated as being entered into in bad morals, *l. 1*, § *si cui cautum* 12, *ff. de extraordin. cognitionibus* (D. 50. 13.), *l. sumptus* 53, *ff. h. t. l. quisquis* 6, § *præterea* 2 *C. de postulando* (C. 2. 6.), and advocates are now ordered to bind themselves

by a solemn oath that they will not enter into such pacts, *Instruct. Cur. Holl. art. Instruct. Curias Brabantiae, art. 288; Curias Flandricae, art. 154*, and it is specially interdicted to them in Holland that they should deal with clients so that they should pray salary only on victory obtained: *Instructio Curias Holl. art. 81. in fine*. Nay more, there are many who are of opinion that all liberality bestowed, during the cause, by a client on his advocate, his attorney, or any similar administrator of a suit, was *ipso jure* null, as having been extorted more from a fear that the suit should be rashly carried on, than proceeding from free will; and thus repugnant to the prohibition which is to be found in *l. si quisquis 6, § præterea 2. C. de postulando (C. 2. 6.)*; *Charondas, libr. 7. resp. 166*, and others to be found in *Wesel, ad novell. constit. Ultrajectin. art. 15. num. 11*. But as where there is a doubt every one is believed to be a good man, nor is fear to be presumed in liberalities shown, nor in last wills or contracts, but rather to be proved like a crime: *arg. l. ad invidiam 6. l. metum 9. C. de his quæsi metusve causa (C. 2. 20.)*; *Menochius, libr. 8. præsumpt. 4. num. 4. et libr. 4. præsumpt. 11. num. 1. 2*; and as the tribunals do not now suffer from want of patrons, so that a client need not fear that his case will be deserted in law by its patron; as, further, he can easily, if he suspect anything sinister, commit the charge of his suit to one less suspected; therefore I do not think that the view of those who think as above is to be approved of, unless, from various circumstances, the signs of circumvention, and of an extorted liberality, are sufficiently obvious to a careful and circumspect judge. For who will deny that at the very time of the suit a great number of causes of conferring a donation, or a legacy, by a client on his patron, may interpose themselves, which causes have no union or connection with the suit? Nor are the more general words in *d. l. 6, § 2. C. de postulando (C. 2. 6.)* opposed to this, as if all agreements were interdicted; since that law must rather, according to the other laws cited above, be taken as applying to those agreements which are forbidden to be entered into, being in bad morals, made as to a share of the lawsuit, or as to a reward during the suit, or a reprobated purchase of suit. See *Claude Henry, recueil des arrêts, tom. 2. libr. 4. quæst. 55*; *Abr. Wesel, ad d. l. art. 15. novell. decis. Ultraject. num. 13, 14*.

19. In the same way these writers think that any pact between a doctor, surgeon, or dealer in medicines, and a patient, by which an advantage might come to them with the loss of the sick or suffering man, is to be reprobated, if it be interposed during their attendance. But neither law nor reason dictates that; nor is Ulpian of that opinion in *l. medicus 3, ff. de extraordin. cognit. (D. 47. 11.)*, where he means nothing else than that a contract is to be rescinded which a medical man had in fact extorted by the use of unfavourable medicines; and where if any one else, not being a medical man, had administered these to one who was ill, there would have been provided the ordinary remedy of "restitution on account of fear." "If a medical man," he says, "had

had entrusted to him the cure of eyes, by a suffering patient, and by inducing, by unfavourable medicines, the danger of losing their use, he compelled the sick man to sell his possessions to him, contrary to good faith, the president of the province will restrain the illegal act, and order that the thing be restored;" and so nothing will then be given, in the spirit of the lines of Martial, *libr. 11. Epigr. 59*, that "if a barber stand over me with his naked razor and asks my liberty and my riches, I will promise it to him, because it is not the barber who at that moment asks it of me, but a thief; fear of him then rules imperiously. But if he has replaced his razor safe in its curved receptacle, I will strike the barber with both hand and foot." Where, therefore, there is no such proof of detestable malice, it will not be more presumed in this case than in the former case of the advocate; and what has been *bond fide* contracted between them will be ratified. Moreover, as there is no force in words which are uttered in the sudden heat either of anger or affection, unless a perseverant intention have thereafter appeared, *arg. l. quicquid 48, ff. de regulis juris* (D. 50. 16.) *l. divortium 3, ff. de divortiis* (D. 24. 2.), and as, further, one's "last will" is not taken to be shaped by what is rashly uttered, nor obligations contracted on what has been thus rashly uttered, § 1. *Instit. de militari testam.* (I. 2. 11.) *l. sciendum 12, pr. et § ea autem 3, ff. de sedilit. edicto* (D. 21. 1.); so also it is true that no obligation is contracted whenever patients, oppressed by anxiety, offer greater promises to their medical men in case of their cure, even to those who did not ask it, much less to those extorting it by fear, which promises they would not have offered if they had seriously weighed the matter; for the restoration of health neither wholly depends on the medical art, nor is the arbitrament of life and death with medical men. And this is all that the Emperors laid down:—"that they would allow medical men to accept what healthy patients offer for obsequies, not what those who are in a dangerous condition promise for their health": *l. archiatri 9. C. de professor. et medicis* (C. 10. 52.); which opinion is so much the more consonant to OUR MODERN LAW, because our medical men are certainly of a more honest character than the Romans anciently were, the latter being often slaves, very often of a very low condition, and labouring under the stain of rapines, plunderings, assaults, and other similar crimes, and therefore not free from every suspicion of inducing fear. *Matth. de Afflictis decis. 123*; *Marta Digesta Juris Noviss. tom. 3. tit. obligatio num. 12*; *Fachineus, controuv. libr. 2. cap. 25*; *Pinellus, ad. l. 2. C. de rescind. vend. part. 2. cap. 2. num. 32. 33*; *Rebuffus, ad constit. reg. tom. 2. tract. de resciss. art. unic. gloss. 15. num. 44*; *Claude Henry, d. tom. 2. libr. 4. quæst. 55*; *Charondas, libr. 7. respons. 19. in fine*; *Zoezius, ad Pand. h. t. num. 20*; *Abr. à Wesel, ad novellas Constit. Ultraject. art. 15. num. 10*.

20. Useless also are those pacts by which an owner has deprived himself of discretion and control as to his own things whenever no utility arises therefrom to another; for since a pact does not affect a

thing, but binds a person to keep faith, when he does not keep his promises no action can be given by the Roman law for "that which it advantageth" (*id quod interest*); and even if an action were now freely given on the pact, there would be no occasion for it, since it would advantage no one. And in that sense it is true that no one by pacting can bring it about that he cannot "dedicate" his own place to himself; or that no one should allow himself to bury any one in his own mortuary; or that he should not alienate his estate without the permission of his neighbour: *l. pen. ff. h. t. arg. l. filius familias* 114, § *Divi Severus* 14, *ff. de legatis* 1. (D. 30. 1.). But if you put the case of its being of advantage to the pactor, and that such pact was adjoined by the Roman law to a *bonæ fidei* contract, as a sale, it is more correct to say that it ought to be upheld, although there was formerly a doubt on the point, *l. ult. C. de pactis inter emp. et vend. l. qui Romæ* 122, § *coheredes* 3, *ff. de verb. obligat.* (50. 16.) *arg. d. l. 114, § 14, ff. legat. 1.* (D. 30. 1.), not because what is done against the pact is *ipso jure* null, or would affect the thing itself, unless such a pact were, according to the custom of these regions, added and expressed in making a solemn transfer of an estate according to the local law; or unless the person adding the pact reserved to himself any right in the thing itself, as of direct ownership, or if he gave it in emphyteusis, *Annæus Robertus rer. judicat. libr. 8. cap. 14*, but because a personal action would be given to the pactor for "that which it advantageth" or for a penalty (if any were added to the agreement): *d. l. ult. C. de pactis inter emp. et vend.* (C. 4. 54.) *l. qui Romæ*, 122, § *coheredes* 3, *ff. de verb. obligat.* (D. 50. 16.) *arg. d. l. 114. et 14, ff. legatis* 1. (D. 30. 1.); *Andr. Gayl, libr. 2. observ. 16. num. 5. 6*; *Joh. a Sande de prohibita alienatione, part. 4. seu ult. cap. 1*; *Louets en ses arrets lit. S. art. 9. des substitutions contractuelles.*

21. Lastly, pacts contrary to the freedom of marriage seem also to be reprobated, as when two pact between themselves that whichever first marries shall give to the other a certain quantity of money, for marriages ought to be free, and it is against honesty and good morals to narrow them by the tie of a penalty, *l. titia* 134, *ff. de verb. obligat.* (D. 50. 16.); *l. libera* 2. *C. de inutil. stipulat.* (C. 8. 39.), even if it were not added that it should be given by way of a fine; since in any case the promise "to give," in respect of him who contracted the marriage, is really resolved into a penalty, and, save as to the words in which it is couched, it differs not from a penalty, is indeed a penal condition, if you regard the scope and intention of the pactor, according to whose mind it must be determined whether it be a condition or a penalty: *arg. l. ult. ff. de his quæ pænæ causa relinq.* (D. 34. 6.). Nor is it in conflict with this that a donation, a legacy, or an institution as heir can be made under condition of widowhood, *novell. 22. cap. 43*, as to which we have more fully treated in the *tit. de condit. institution.* (*post*, 28. 7.); for in that way marriages do not seem to be impeded by the threat of penalty or of loss, but rather that one is invited to widowhood by the premium of a

legacy or institution as heir. And as it is one thing to take away freedom of marriage by fear of penalty and another to invite to matrimony by a certain condition, *l. Titio centum* 71, § *Titio centum* 1, *ff. de condit. et demonstrat.* (D. 35. 1.), so also it is one thing to deter from marriage by fear of penalty and another thing to be moved by liberality shown towards continence and the neglect of marriage. See *resp. Jctor. Holl. part. 5. consil. 23.*

22. Besides, as every one, by pacting, benefits himself and not another, according to what has been before said, so also he injures himself only and not others; not even can he injure others in those cases in which by the Roman or the modern law he can benefit others; because it is consonant to natural reason that our condition may be made better by others, but not worse, and that every one's act and pact should benefit himself, but not another: *l. non debet* 74, *ff. de reg. juris* (D. 50. 17.); *l. si unus* 27, § *pacta quæ* 4, *in fine*, *ff. h. t.* (2. 14.); *l. debitorum* 25, *C. h. t.* (C. 23.). Hence, although by the pact of the principal debtor "not to sue," the surety also is freed, yet if the debtor then again pacts with the creditor "that he can sue" the debtor only, and not the fidejussor, will be bound by the latter pact: *l. ult. ff. h. t.*; nor does Paulus contradict this in *l. si unus* 27, § *pactus* 2, *ff. h. t.*, the meaning of which is not other than this, that for the same reason by which the debtor in a second pact "that he may be sued" brings it about that the former pact interposed as to *not suing* cannot retain its strength; for the same reason sureties who have pacted as to *not suing* may bring it about by a subsequent pact that their former pact does not advantage them. For unless you thus receive the words of Paulus, the reason would not be the same by which every one injures himself and another by pacting, but very different.

23. And to such an extent is it true that one cannot injure another by pacting, that the same principle cannot otherwise than be laid down as a rule, when there is a question as to a pact of the greater part of a body of creditors remitting portion of a debt; for that which concerns all, and each as each, but must be also approved by each separately: *arg. l. per fundum* 11, *ff. de servitut. præd. rustic.* (D. 8. 3.) And here the question is as to the loss of the thing, or right, competing to each one privately. Every one is supposed to be the regulator and arbiter of his own, not of another's, and therefore he is able to renounce his own right, but not the right of another; he can be liberal as to his own, but not as to another's, and must be careful, above all, that an agreement made as to one thing, or one person, does not injure another thing or another person: *d. l. unus* 27, § 4, *in fine h. t.* And it would be unjust that when the greater part of the creditors, moved either by reason of pity or affection, should remit a proportion of the debt, the reluctant minor portion should also be taken to have remitted it: *Placitum Caroli V.* 19 *Maj* 1544, *art. 35*; *Jacobus Coren, consil. 8*; *Groenewegen, ad l. 8, ff. de pactis. Respons. Jurisc. Holl. part. 1. cons. 218. et part. 3. vol. 1. consil. 166. post med.*; *Henri Kinschot, de rescript. gratias, tract. 4. de solut. indoc. cap. 8.*

num. 8. From which it follows that if a tutor has pacted in the name of a burdened pupil with most of his creditors as to a part of the debt, the pupil himself will not be bound to be content as to that part, lest a necessary office should be injurious to him ; because perchance if he were placed in a different position (as they say) he might, when requested by the tutors, have been unwilling to come to terms with them as to such portion only : *Groenewegen, ad l. cum hereditas 59, ff. de administrat. tutor.* By the law of Zealand, however, it was found meet that whenever a debtor without fraud was pressed by the amount of his debt, he was allowed so to pact with his creditors as to part, that if three-fourths of his creditors, or two-thirds to whom three-fourths of his debt were due, consented, this so far prevailing major part of the creditors and the estate ruled the minor part, and that part of the debt would be remitted by all, provided they were lawfully called together, penalties being fixed for those colluding : *placit. ordin. Zeland. 11 Dec. 1649, vol. 1. placit. pag. 407 et seqq.*

24. But if a debtor is dead and his heir refuses to adiate the inheritance unless a certain part of the debt is remitted, if the major part consented to the remission of a certain quantity, the minor part was bound to follow the consent of the greater. For unless in that case the major ruled the minor portion, it would be in the power of a few, with a lesser interest, to injure the many, with a larger interest ; inasmuch as if the heir repudiated the inheritance, the greater part would be defrauded of the power of suing the debtor on account of the dissent, often imprudent perhaps, of the lesser part ; by this the heir, who would be bound to them *in solidum*, would be deterred from the adiation. Whereas, on the other hand, in the preceding case, no prejudice was wrought to the larger portion of the creditors by the dissent of the minor portion. Nor can a probable suspicion of collusion or rash remission be brought forward by way of objection to my view, both because no one is to be presumed to wish to throw away what is his own, and because every one is taken to be good and beyond the fear of collusion until the contrary is proved. Nor is it readily to be assumed that the greater part would, against its own advantage, collude to the destruction of the lesser part ; and if damage must be done either to the lesser part by the major part, or to the major part by the minor (although loss from the major part is more to be presumed to be absent, as stated), it would be better that the minor part be injured by the will of the major part than the opposite. And this case is treated of in *l. jurisgentium 7, § si ante aditam 17 et seqq. et l. 8. l. 9. 10, ff. h. t. ; Matth. de Afflictis. decis. 288 ; Costalius ad d. l. Jacobus Coren, d. consil. 8 ; Ant. Matthæus, de auctionibus, libr. 1. cap. 7. num. 2 ; Responsa JClor. Holl. part. 3. vol. 1. consil. 166. in med. et part. 1. consil. 218.*

25. These limiting conditions as to an inheritance yet to be adiated being assumed, it does not seem doubtful that a tutor hesitating, in the name of his pupil, as to whether an inheritance left to his pupil should

or should not be adiated on account of a mass of debt, is bound when he pacts from the same cause with the major part of the creditors as to a part of the debt, to be contented with that part; both because in that case he prejudiced the minor part dissenting, and therefore himself, if he very much wished to dissent, and because it is not fair that he who had called the other unwilling parties on account of the major part consenting to the portion, should not be content with the same part, and lay down a different law for others than for himself: *l. cum hereditas* 59, *ff. de administration. tut.* (D. 26. 7.); *l. cum in eo* 44, *ff. h. t.*

26. Nor is it right to think with Henr. Kinschot, *de rescript. gratias tract.* 5. *de solut. induciis cap.* 8. *num.* 5. *in med.*, that by the later law, Justinianeian law, and NOWADAYS, inasmuch as an heir who has made inventory can adiate the inheritance without fear of damage, that the provision in *d. l.* 7, § 17 *et seqq. et l.* 8, 9, 10, *ff. h. t.* ceases as to an heir, and that a remission of part to the prejudice of the lesser dissenting number can no longer be made. For although an heir is put beyond loss by reason of the inventory, not so are the creditors, who, when the estate goods have been perchance distrained for a lesser price than the market value, and are to be sequestrated and dealt with at greater expense, would get much less than if they leave the timely sale and the other charge of the estate to the heir himself without any more serious outlay. So that in respect of creditors also the same principle prevails: nor would it be fair that it should depend on the fewer dissentients, whom it did not so much interest, but who exercised an untimely rigour and hardness of dealing, that the remaining major portion of the creditors should get less. Add to this that the Preface of the said *placit. ordin. Zeland.* 11 Decemb. 1649, and the very exception of Kinschot, who in the said passage admits our view, when, on account of the difficulties of the times, immovables are of very low price: which reason equally prevails in movables, especially the saleable things of merchants daily varying in price. Not to mention that heirs often, especially children who are heirs, and wish to consult the honour of the deceased, even adiate the inheritance to their own detriment, if they can come to terms as to the debt with the creditors at a little loss, lest, the goods being sold in the name of the deceased, he should incur ignominy after his death: *arg.* § 1. *Instit. quib. ex caus. manum non licet.*

27. What has been so far said as to an heir refusing to adiate if part of the debt be not remitted, is, on parity of reasoning, extended also by the interpreters to those who are fugitives and hide on account of debt, and are therefore difficult to be summoned, and refuse to give up their goods and to appear, unless summoned by their creditors for part; their immovables, which are of greater moment, nowhere appearing. *Jacobus Coren, dict. consil.* 8. *num.* 24. *et seqq. Matth. de Afflict. decis.* 288. *Simon van Leeuwen, cens. forens. part.* 1. *libr.* 4. *cap.* 45. *num.* 6. *Respons. JCtor. Holl. part.* 3. *vol.* 1. *cons.* 166. *in med.*

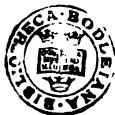
28. But when a pact contains a part remission of the debt, the

remitters ought not to have conceded to them their rights and actions for further recourse thereafter, *l. quæritur* 14, § *si venditor* 9, *ff. de ædilit. edict.* (D. 21. 1.) *si maritus* 15, § *si negaverint* 5, *ff. ad leg. Jul. de adulter.* (D. 48, 5.), *arg. l. 1, § qui semel* 6, *ff. de success. edicto* (D. 38. 9.), nor to repent of their pity and good deeds done; we will more rightly say that the debtor cannot any longer be summoned for that which is remitted, even if he returns to better fortune: although it cannot be denied that reasons of equity ought to move him to compensate of his own accord when his means improve: *Mollerus Semestr. libr. 4. cap. 6. num. ult.* *Brunnemannus, ad d. l. 8. et 10, ff. h. t. num. 16. 17.* And it is on this ground that if creditors pact as to part of a debt with a debtor no action is to be given against the fidejussor of a debtor beyond that part, the principal obligation being regarded as in so far extinguished, unless the creditor be one who had joined himself to the minor part and had thus dissented: or was absent: in which case as it cannot be said that he naturally consented to the remission, but his assent can only be feigned by a certain gathered interpretation, and that in favour of the debtor and the other creditors, not of the surety; there is no underlying reason why an action *in solidum* should not be allowed to him as against the surety. But he is considered to have afterwards consented if he summoned the heir for that part which he remained indebted in by virtue of the pact. Nor can the debtor be defrauded, inasmuch as when he is summoned by the sureties *in solidum*, nothing will be restored to them beyond the part as to which the pact was entered into with the major part. Which I think is the sense of *l. si præcedente* 58, § 1, *ff. mandati* (D. 17. 1.). *Berlichius, aurear. decis. part. 2. decis. 235. num. 15, 16, 17.* *Straccha, de decoctoribus p. 6. num. 15.* *Brunnemannus, ad d. l. 8. et 10, ff. h. t. num. 18.*

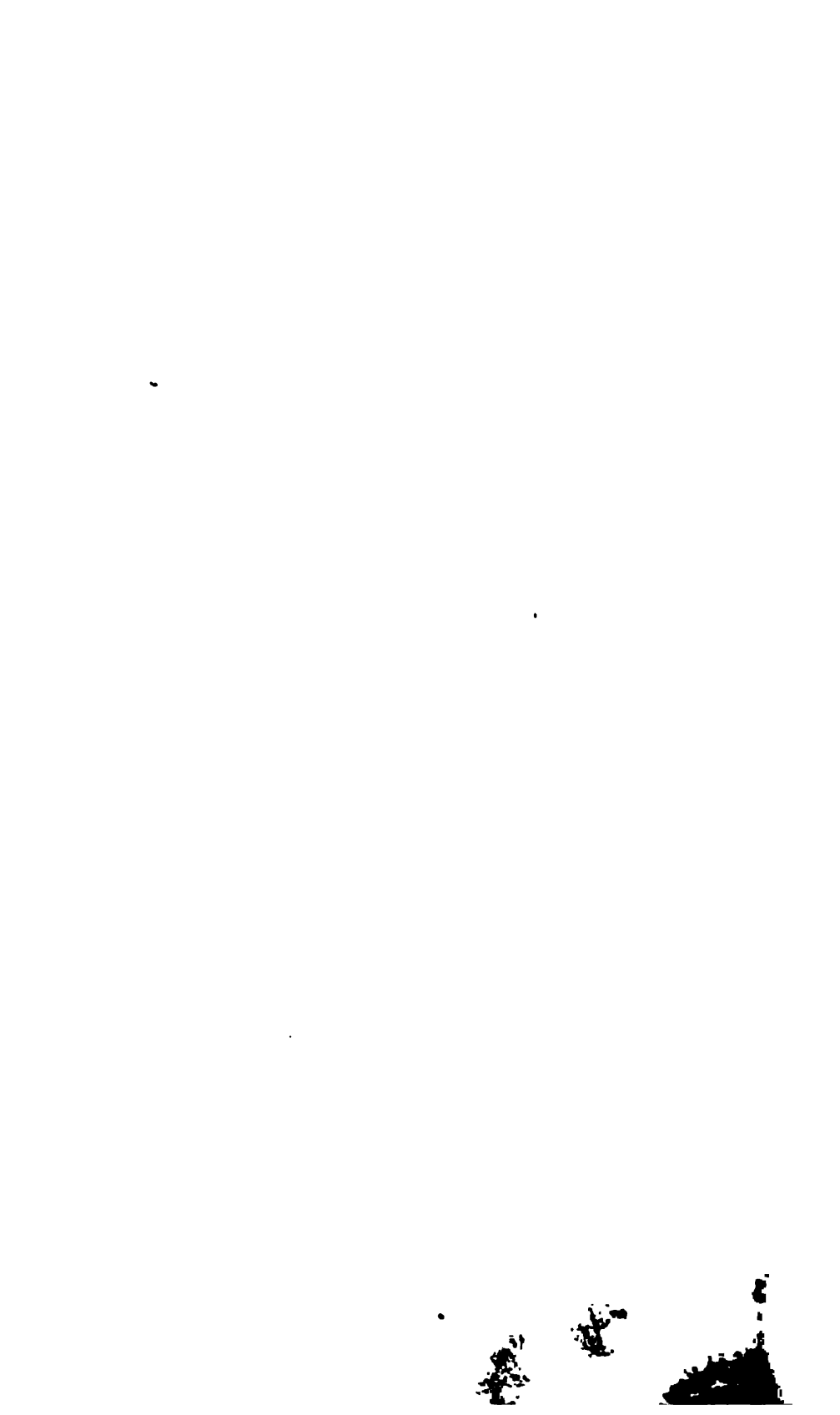
29. What is, however, the "major part" of the debtors in this pact is to be estimated not by the number of persons but by the mass of the debt: *l. majorem* 8. *l. 9, ff. h. t.* Nor are other debts to be here taken into consideration than those which can be taken away without the creditor's consent, by virtue of the consent of the major part of the creditors; and which are of the same nature, so that out of the mass, alone, of the debt the major part draws to itself the minor; and thus the wish of the hypothecary creditors is not to be consulted, because the right of hypothec cannot be simply taken away by an agreement of the chirograph creditors: *d. l. si præcedente* 58, § 1, *ff. mandati* (D. 17. 1.); *l. rescriptum* 10. *ff. h. t.*; *Henr. Kinschot, de rescript. gratiæ, tract. 4. cap. 8. num. 4*; *Anton. Matthæus, paræm. 7. n. 16*; *Brunnemannus, ad d. l. 8. et 10, ff. h. t. num. 8 et seqq.* Whether the same is, however, to be said as to privileged chirographic creditors, is rendered doubtful by the opposite responses of Ulpian and Paulus, of whom the former thinks that the pact of the major part injures all those not having an hypothec, and therefore also privileged chirograph creditors, and even the fisc in those cases in which it has acquired a privilege without pledge:—the latter on the

other hand says that it is unjust that the privilege shall be taken away from them, and that it would be equally unjust if the pledge were taken away: *d. l. si præcedente* 58, § 1, *ff. mandati* (D. 17. 1.). Cujacius thinks that Paulus decides the question on the reason of the law, but Ulpian on the rescript of Pius Antoninus, nor is it a novelty that rescripts are opposed to the reason of the law, *Cujacius, ad d. l. 10. h. t.*, which certainly is not improbable in this case, where the princeps principally remitted as to his own right or as to the right of the fisc, and on that occasion adds at the same time the privileged creditors, whom he did not then wish to be of better condition than the fisc. The opinion is different of *Pacius, enant. cent. 1. num. 89. Vinnius, de pactis, cap. 17. num. 6. & 8.* Zeeland has followed in its placat the view of Paulus as being more consonant to reason. *Placitum 11 Decemb. 1649, art. 8. vol. 1. placit. pag. 409.* Nor would it be just that the major number consenting should make the condition of others harder than their own, or that by their own wish they should deprive others of their own benefits and privileges granted by law. See *Berlichius, part. 2. decis. 236-7, 241-2.*

30. According to OUR MODERN LAW it is beyond doubt that a creditor to whom a movable thing is only pledged in hypothec, so that the creditor may not encumber it or possess it, is equally prejudiced by the pact of the major part, as are all other simple chirographic creditors dissenting in the lesser part: because in effect of law they are not far removed from each other: nor do movables have a "following up" (*sequelam*): *Ant. Matthæus, paræmia 7. num. 16.*







only

JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

HIS COMMENTARY ON THE PANDECTS:

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LAW IS ALSO DISCUSSED, AND THE BEST
POINTS OF PRACTICE.

R. S. T. JONES

PART VI.

OF THE

~~Vol. I. Bk. XV. pp. 177-198.~~

187 bk II tit XV

ON TRANSACTIONS (COMPROMISES).

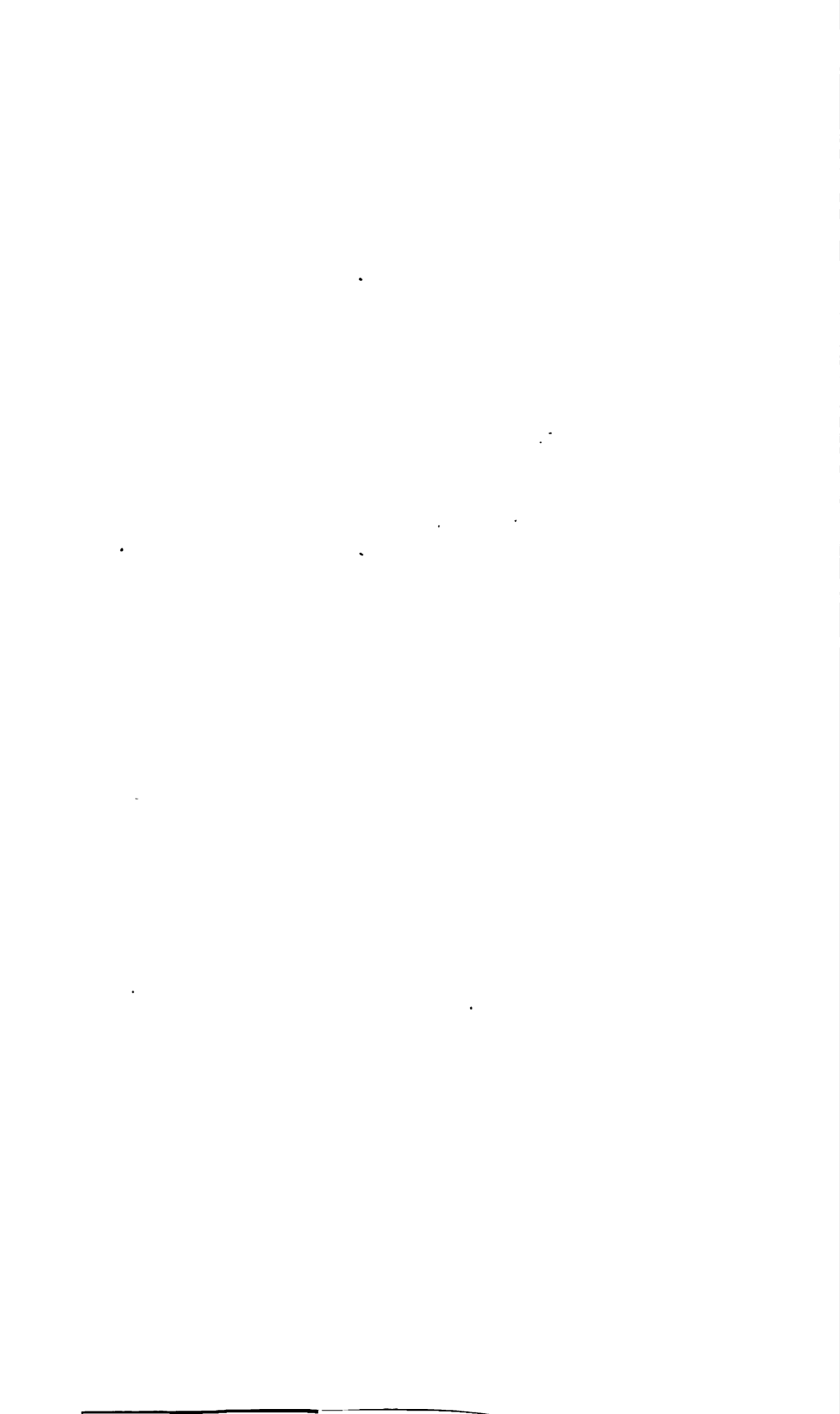
TRANSLATED BY

JAMES BUCHANAN,

OF THE BAR AT THE SCOTCH BENCH, GLASGOW, AND
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GLASGOW: J. E. FULTON.

1863.



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UNIVERSITY OF LEYDEN,**

HIS COMMENTARY ON THE PANDECTS:

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CONTROVERSIES OF THE ROMAN LAW, THE MODERN
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PART VI.,

BEING

VOL. I. BK. XV. pp. 177-198.

ON TRANSACTIONS (COMPROMISES).

TRANSLATED BY

JAMES BUCHANAN,

**ONE OF THE JUDGES OF THE SUPREME COURT, CAPE COLONY, AND JUDGE PRESIDENT
OF THE HIGH COURT, GRIQUALAND (KIMBERLEY).**

CAPE TOWN: J. C. JUTA.

1883.



LONDON :
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BOOK II. TIT. XV.

ON TRANSACTIONS (COMPROMISES).

SUMMARY.

1. "Transaction" defined as an agreement, for value, as to a doubtful thing or suit. Is sometimes a pact, sometimes a stipulation, sometimes an innominate contract, according to form of solemnity used or act done. Something must be given, promised, or retained, to make a perfect transaction. Cannot be resiled from repentantly. May be conditional or unconditional, judicial or extra-judicial, written or verbal; but must be clear and definitely provable. If even a public written instrument recite "a transaction," but give no exact particulars as to what is mutually given, promised, or retained, no transaction is thereby sufficiently proved.
2. Tutors, syndics, corporations, administrators, partnership-managers, &c., can compromise if they do not sacrifice a liquid right, for the object of their appointment is to gain, not to lose. If the subject-matter of the compromise be a minor's (etc.), immovable, or a movable requiring a "decree" to alienate, there must be a "decree" if it is proposed to transfer the litigate immovable on certain compensation by the adversary, or to transfer a non-litigate immovable on condition of the adversary abandoning a suit as to something else. If the minor retained possession of the immovable, giving something in exchange, for the alienation of which no "decree" was necessary, no "decree" to transact is needed, for there is no *alienation*. Nor if in possession of the adversary, and on transaction to remain there, for the possessor's ownership is *primâ facie* presumed.
3. A procurator (attorney, &c.) cannot rightly compromise unless he has special power, or is procurator *in rem suam*, or has a general power with "free administration." If not, all done invalid. The Imperial Procurator [our modern Attorney General—TRANSL.] is reckoned among those without "free administration."
4. A father cannot compromise as to the goods of his major emancipated son, or the war-gains of his minor son. But can do so as to the "adventitious" goods of his major son, if present and consenting. He can even do so as to adventitious immovables, without "decree;" a father's power being fuller than a tutor's, because a father's plans for his children are deemed the best.
5. Can a husband nowadays compromise as to his wife's goods? The better opinion is that he can. He is her tutor, and has a wide tutorial power—almost a father's: he gives neither security, nor does he "account." Hence his powers of compromise are wide. In Holland neither is a decree necessary for alienation of her immovables, nor is the wife's consent. The marital power is nowadays so wide that the husband can alienate these at discretion, without

wife's consent. Therefore he can compromise. With the Ultrajectines it is different: there the tutorial distinctions of § 2 apply; as to—ownership restored or parted with? (*vide* § 2). Fraud would alter the case.

6. One of many co-parties to a suit can, after its contestation and during its pendency, compromise as to his share, without the others' consent. This is Voet's opinion, in opposition to Berlechini's view. Voet argues from the analogy of partnership, partners having full individual right of alienation, pledge, &c. Voet does not think that the joint contestation of suit has induced a quasi-judicial contract not thus to compromise, any more than a joint suretyship would. It is only in "divisory suits," he shows, that one of many parties to it cannot, after "trial begun," alienate or compromise as to his share. In all other suits, yes.
7. Refers to alienation by "vassals" of feudal rights; and is omitted, as being of no present application: the ancient and mediæval institutions of "vassalage" having ceased.
8. What if the fiduciary compromise without the fideicommissary's consent as to a doubtful fideicommissum (trust): are the heirs of the compromisers bound to adhere to the compromise? It is a moot point, which Voet elaborately discusses. His view is that the fiduciary heir *can* so compromise, if there is a clearly doubtful right, and no fraud, nor a remission of a clear right. He argues that if a mere administrator of others' goods can do so, much more can a fiduciary, who is in fact a temporary owner, and may even become a full owner when the condition or person of the trust fails. He reconciles away passages in the Digest which seem to "look the other way," and refers to passages which bear him out. So a lawsuit begun before restitution injures the fideicommissary, not after. Other temporary right-holders he shows have similar rights: e.g. hypothec creditors of part of estate who "compete" with others. He shows that if by payment of bonâ fide expenses and bonâ fide lawsuits and "denouncements," a fiduciary binds a fideicommissary: much more so by a compromise. Yet Voet thinks the fiduciary will act *more prudently* if he abstains from compromises, and allows the matter to be settled by judicial sentence.
9. If a fiduciary compromise with a fideicommissary as to a doubtful fideicommissum, it will bind the heirs of the compromisers. Even if heirs are not mentioned in the compromise: unless such heirs repudiate or adiate under inventory.
10. Compromise may be as to uncertain rights, issues, conditions: or as to a doubtful fideicommissum itself; or as to a doubtful lawsuit, even begun; or as to things general or particular, e.g. an inheritance or a particular estate.
11. The Roman law forbade compromises as to judgments actually delivered, save in so far as right of appeal or of restitution still existed: or where, by certain processes resorted to, the judgment was regarded as destroyed by pact. By the law of Holland judgments can be compromised; and a principal can compromise even after there is judgment against the surety, as it may yet benefit both.
12. There can be no compromise as to what is left by testament. Testamentary controversies can alone be accurately enquired into and settled by an examination and construction of the words of the will itself.
13. This inspection of the testament cannot be renounced, for it is not an individual right capable of renunciation, but is the right of others, or a public right, viz. that testamentary dispositions be upheld. If testator's will perfectly cognizable without inspection, it is different: e.g. a nuncupative will *cannot* be inspected, therefore witnesses suffice. A gratuitous pact before inspection is good, or a repudiation.
14. Aliment contracted for can be compromised, for contract is its basis, and contracts can dissolve, without need for prætor's decree. But if aliment is left by testament it can be only compromised without decree, *for the past*, if unpaid; to compromise for the future, decree is necessary to guard against present allurements to surrender future rights. Aliment may be declined for scantiness,

or because not needed. There are some who would depart from the Roman law by allowing free compromise of aliment, but Voet seems to share the view of those who think it safer to hold a decree necessary, or magisteria ratification, failing which the compromise would be rescinded. Even when a decree as to future aliment is once legally interposed, its construction is strict, and in doubtful cases as little remitted as possible.

15. In matrimonial causes, following the Canon law principles, the commentators say there can be compromise; but by private pact you cannot destroy a marriage once contracted, for it is not a mere private contract. But uncertain spousals only can be compromised for a consideration: this is daily practice.
16. You cannot compromise future crime, for that is an invitation to crime. Past crimes you can, within certain limits: *e.g.* where the punishment was fine going to the plaintiff party injured. [But note that suit system of fine going to injured party is now obsolete, as the state recovers.—TRANSL.]
17. Public crimes, non-capital, you cannot compromise, without subjecting yourself to the penalty of being convicted.
18. Capital crimes you could not compromise, except adultery and abduction [which have ceased of course in practice to be capital.—TRANSL.] Others you could, but it is better not. Relatives of a murdered person can compound for money as far as the injury to themselves goes, but the public right of accusation and punishment is not thus barred, but fully continues. Voet shows that, as "everything which is lawful is not honourable," there are some things the law allows you to do it is better *not* to do; and compounding capital crimes is one: *e.g.* a seller of wine by measurement, on condition of measurement by a certain day, has the *strict right* to throw out the wine, to the purchaser's loss, but is to be praised if he does not do so actually. Purchasers and sellers *may* legally "get round" (circumvent) each other to a certain extent, if no "enormous lesion" follows, but it is more right to give fair value.
20. The foregoing (16–20) was the Roman law. The law of Holland allows compromise of crime (without any distinction of public or private, capital or not capital) by the relatives and heirs of the injured party. But this only for any *civil* action, competent to them for indemnity, or that which profiteth (*id quod interest*). This did not prevent public prosecution by the constituted authorities. [Vide THOMAS *vs.* THE QUEEN, Appeal Court, Cape Town, January 1883, where it was on a "point reserved," from Circuit, held that it is a crime to compound crime.—TRANSL.] Formerly in Holland the state authorities could not compromise; subsequently they could, for lesser crimes, or where proof was difficult or doubtful. [This is practically equivalent to those cases where the Attorney General "declines to prosecute"—TRANSL.]
21. Effect of transaction is to destroy the lawsuit, as much as does a judgment delivered; but only to the exact limits or amount of the compromise, and not beyond. If the compromise is general, its effect is general: if as to a specific sum it is specific: anything beyond, subsequently emerging, is not included. If there is a compromise, say, between co-heirs as to *all* the estate goods, and one co-heir have removed *some* goods, the latter are not included in, for they were not the subject of, the compromise. A compromise as to *present* things does not include the *future*. So reconciliation between wounder and wounded does not bar action for loss and damages. Co-heirs compromising as to a present estate are not taken as including a speculative future fideicommissum unless words of compromise are very wide. But if the existence of fideicommissum were known at time of compromise it is included. For though if I ignorantly buy a thing legated to me I can yet recover it or its price, yet if I buy with my eyes open I defeat the legacy. So with the fideicommissum.
22. Compromise can only bind the compromising parties: on the principle of "*res inter alios*," etc. Thus compromise of one co-heir cannot bind another not consenting or ratifying: such co-heir, therefore, not bound beyond his share unless he have given security *de rato*, except for the loss he has put others to.

Compromise between testamentary heirs and heirs *ab intestato* does not prevent legatees proceeding against the testamentary heir *in solidum* in respect of what he actually gained by the compromise. Legatees can appear to defend an action to declare a will inofficious, since thus they protect their own legacies: they can also appeal, if the instituted heir fails or surrenders his right, and can still recover their legacies if, despite the heir, they can support the will. Nor does a compromise bind estate-creditors, nor the legal heir, if testament is bad, from proceeding against the instituted heir, Scævola's opinion explained. Since the *novel* 112, however, creditors and legatees can go against both legal and testamentary heirs.

23. A compromised lawsuit cannot even be resuscitated by imperial rescript. Nor for "newly found-out documents." In this respect it equals a judgment. Nor for no cause of action, for the uncertainty thereabout was a good consideration for the compromise. But fraud vitiates, of any kind; or untruth; or duress; or falsity of celebration; or miscalculation. Then equity averts loss; unless the compromise was as to the very miscalculation itself [*e.g.* renunciation of *exceptio*—"error calculi"—in a bond, &c.—TRANSL.]
24. Transaction is not destroyed for "enormous loss" over the half, unless fraud or chicane intervene; not even for a three-fourth loss; nor for a total loss through non-existence. For the recession from the suit was a sufficient consideration. Nor would a judgment be open to rescission on this ground, and a compromise cannot be stronger than judgment. VOET HERE DIFFERS from Fachinæus, Carpzovius, Berlichius and others. He shows why. A compromise by nude pact gives rise to an action, and not merely to an exception, as by the Roman law. A compromise can be enforced at any time within thirty years, the period of prescription of personal actions. Where there is a compromise, and a penalty on breach, and you "elect" to proceed for one or the other, you are bound by such "election."

"1. TRANSACTION (compromise) is an agreement concerning a doubtful thing or an uncertain lawsuit; a non-gratuitous agreement, something being given, retained, or promised: *l. transactio* 38 *C. h. t.* (*C.* 2. 4.) And just as a donation can be perfected by pact, or by stipulation, or, lastly, by tradition: so also is this the case with respect to transaction: which is, in like manner, then to be reckoned among pacts, when it takes place by bare consent; among "stipulations," if the solemnity of words have intervened; among "innominate contracts," when what had been decided on by a simple agreement, as to a doubtful thing, is confirmed by "a giving" (*datiōne*) or an act done (*facto*): *l. actione* 4, *l. cum mora* 6, *l. ut responsum* 15, *l. cum proponas* 17 *C. h. t.* (2. 4.) although on account of the favour shown to settled lawsuits, it is not allowed to recede, on ground of repentance (*ex pœnitentiâ*) from such innominate contract: *l. quamvis* 39. *C. h. t.* (2. 4.); *arg. l. in summa* 65, § 1 ff. *de condict. indeb.* (D. 12. 6.), for causes once terminated by legal "transaction" ought not even to be resuscitated by imperial rescript: *l. causas* 16 *C. h. t.* (2. 4.) Transaction can take place either unconditionally or conditionally, *l. si super* 9 *C. h. t.* Nor does it matter whether it is interposed judicially, and "on the record" (*apud acta*) or extra-judicially: nor whether in writing or without writing, as long as it is capable of proof: *l. sive apud* 28 *C. h. t.*, *arg. l. in re* 4 *in fine*, ff. *de fide instrum.* (D. 22. 4.)

But it will not be considered sufficient proof of "transaction," if there be found laid down in a written instrument, even a public one, that there has been "a transaction," if it be not further expressed what, and how much, has been given, retained, or promised on both sides; for this reason that all transaction is useless (*inutilis*) (i.e. of no effect) in which it is not proved that something has been given, retained, or promised: *l. transaction. 3 C. h. t. (C. 2. 4.) Andr. Gayl. libr. 2, observat. 71. num. 3 et seqq.*

2. All persons may compromise who are not prohibited. Therefore tutors, syndics, administrators of corporations, managers (*magistri*) of partnerships, and other similar persons, can compromise for their wards, corporations, partnerships: provided that they do not from partiality (or resultlessly) remit a liquid right (*si modo jus liquidum haud ambitiosè remittant*)* for all these persons (tutors, &c.) are appointed, not to destroy the goods of the wards or corporations, nor to dissipate them, nor to injure them at their (the tutors', &c.) own will, but rather that they procure an advantage: *l. Lucius 46, § ult. ff. de admin. et. peric. tut. (D. 26. 7.): l. non omni 16 Cod. eod. (C. 5. 37); l. ambitiosa 4, ff. de decret. ab ordine faciendis (D. 50. 9.); l. 14, ff. de pactis (D. 2. 14.); l. præses 12 C. h. t. (C. 2. 4.); l. si pignore 54, § ult. l. interdum 56, § qui tutelam 4, ff. de furtis (D. 47. 2.) Tyraquellus ad l. si unquam 8. C. de revoc. donat. in verbis donatione largitus, num. 196. Montanus de tutelis, cap. 33. num. 239, et multis seqq. et num. 289, 290, 291. Vinnius de transactionibus, cap. 3. 7, 8, 9. Respons. Jurisc. Holl. part. Q. Consil. 201. For although a "defender" of municipalities, or of any corporate body, is not allowed to refer to oath (*jusjurandum deferre*) unless he has a mandate so to do, *l. jusjurandum 34, § defensor. 1 ff. de jurejurand. (D. 1. 2. 2.)*, yet he does not seem to be thereby impeded in his liberty of transacting in a doubtful cause. For as in the "oath of reference" proffered, a total loss of right may be imminent, if the adversary do take such oath, while in a "transaction" something always remains over to the transactor, it is not therefore to be wondered at that the law more readily allowed such a "defender" to transact than to make "oath of reference." Not to mention that, a "defender" excepted, neither tutors, nor curators, nor others similarly situated, were prohibited from sanctioning the oath of reference in the doubtful causes of their wards: *l. jusjurandum 17, § si tutor 2, l. tutor 35, pr. ff. de jurejur. (D. 12. 2.)* But if the question arise as to an immovable belonging to minors, or those similarly situated, or as to such a movable as cannot be alienated without a decree, there will always be need for a "decree" to transact, wherever the tutor, by force of the transaction, cedes to the adversary the litigated immovable the tutor was holding, something being accepted*

* The meaning and extent of these words, and especially the scope of the word "*ambitiosè*," were fully considered in the case of the Smithfield Municipality: High Court, Bloemfontein, 1879. Vide Pamphlet Report of that Court's proceedings. Boockenhagen and Co., Blfu. O. F. S. Non "*ambitiosè*" practically means that there must be a "quid pro quo" where practicable.—[TRANSL.]

in return : or gives to his adversary an unlitigated immovable in order that he (the adversary) may relinquish a lawsuit about another thing : *l. non solum 4, C. de præd. et aliis reb. minor. sive decr. non alienand. (C. 5. 71.)* It would otherwise obtain were it effected, by transaction, that an immovable remains with the minor, and that he should give in return something for the alienation of which no decree was necessary : or if the litigate immovable were not possessed by the pupil, but by his adversary, and then, by transaction, remained with such possessor : because in the former case the immovable thing is not alienated, and in the latter case it cannot seem to be alienated, since in case of doubt the presumption is in favour of the possessor's ownership. *Montanus de tutelis cap. 33. n. 239 et mult. seqq. Gomerius var. resolut. tom. 2. cap. 14. num. 15. Menochius de arbitr. jud. libr. 2. cum 171. num. 74. Sande de prohib. alien. part 1. cap. 1. § 3. num. 26, 27, 28. Pinellus, part 3. l. 1. C. de bonis maternis num. 45. Brunnemannus ad l. 3 et ll. seqq. C. de prædiis et aliis reb. minor. num. 2. Hugo Grotius manuduct. ad jurispr. Holland. libr. 3. cap. 4. num. 7. Confer Andr. Gayl. libr. 2. observ. 72. Argentæus ad consult. Brit. art. 482. gloss. 2.*

3. As to a procurator (attorney, &c.) he does not otherwise rightly compromise than if, either, he has a special mandate, or is appointed to manage affairs as if they were his own (in *rem suam*), or has been provided with a general mandate with the "free administration" (clause) ("*cum liberâ administratione*") : for it is agreed that even "reference to oath" can be made by such an one : *l. iusjurandum 17, § ult. ff. de jurej. (D. 12. 2.)* in connection with *l. 2 ff. eod. tit.* : if any other kind of procurator compromise, the transaction will not be held valid, whether he be appointed "to act" (*ad agendum*) or whether he be appointed by a general mandate without free administration : *l. transactionis placitum, 7 C. h. t. (2. 4.) l. mandate generali 60, ff. de procurator. (D. 3. 3.) arg. l. alius autem 18, ff. de iurejurando (D. 12. 2.) Ant. Faber. Cod. libr. 2. tit. 4. defin. 7. Bronchorst enantioph. ant. 1. assert. 51. Hugo Grotius manuduct. ad jurispr. Holl. libr. 3. cap. 4. num. 3, 4, 5, 6.* And among these general procurators who are without power of "free administration" are to be included the attorneys of the emperor, as to whom see *l. 1, § 1, ff. de off. procurat. Cæsar. (D. 1. 19.) l. nulli 13 ff. h. t. (2. 15.)* [*Quære* :—"procurator Cæsaris et procurator generalis" equals somewhat our modern Attorney-General.—TRANSL.]

4. A father also, although he compromise as to the goods of his emancipated son without his consent, can cause no prejudice to his son : *l. de re 10 h. t.*, and the same is the law as to money acquired by the son on war service or quasi war service, for in these respects the son is regarded as of age (*arg. l. imperatores 3 in pr. ff. h. t. joined to l. usque 2. ff. ad Senatusc. Macedon. (D. 14. 6.)*). But to the son's "adventitious goods" (i.e. civilly acquired) the father rightly compromises with the son's consent, if he be present and a major. *arg. l. ult. § 3 et 4 C. de bon. quæ liberis (C. 6. 61.) Sande decis. Frisic. libr. 2. tit. 7. def. 4. Vinnius*

de transaction. cap. 8. num. 23. Nor is there need of a "decree" if the question be as to "adventitious" immovables: both because the laws nowhere require it, and because of old the son had as full power of disposing of these goods as he had of his own: moreover, the case of the father, whose advice to his children is considered the best advice, is different to the case of a tutor: *Vinnius d. loco.*

5. Although a husband is the guardian of his wife, and has a wider authority than guardians (a husband indeed has in most cases equal authority with a father over children under power), inasmuch as a husband is neither bound to interpose security nor to render accounts, from which obligation a father even was free in respect of his son's "adventitious goods;" *d. l. ult. § 4. C. de bon. que liberis* (C. 6. 61.), it is yet doubtful whether he can compromise as to his wife's goods; especially, as to immovables. It is the BETTER OPINION (*verius est*) that there is no need for a decree; nor in Holland is the consent of the wife required: because here the marital power is very extensive, so that even where the wife is unwilling, the husband can alienate her property at his own discretion (*suo arbitratu*), the consequence of which is that even far more is the power of compromising a doubtful cause to be accorded to the husband. As to those places in which the power of alienating the wife's things is denied to the husband, without the consent of the wife, as is the received practice with the Ultrajectines as to a husband having no children, I find it crudely laid down by *Rodenburgh tract. jure conjug. tit. 2. cap. 8. num. 16.*, that compromise is also included under forbidden alienation: whereas you will MORE RIGHTLY (*rectius*) apply in that case the same distinction which I have drawn above as to tutors: namely, that if an immovable does not leave the wife's ownership, as the effect of the transaction, but if only a sum of money be given to the adversary, to induce him to abandon a suit, and thus remove a vexing by the adversary, there will in that case be no need of the consent of the wife, since it is clear that there is no immovable in this way transferred to another. But if, on the contrary, the result is that an immovable be ceded to the adversary, a certain sum of money being accepted, then the consent of the wife is indeed required for the compromise: for then only does an alienation of an immovable really take place. It is clearly in vain to refer, as proof of the contrary, to *l. 1. § at si transegit 9, ff. si quid in fraudem patroni* (D. 38. 5.), which passage treats of a compromise by a freedman, in fraud of his patron, and therefore made with a fraudulent intent: for an alienation *inter vivos* bonâ fide made by a freedman remains valid, *l. 1. § 1. ff. d. tit.*, and besides a freedman is not only prohibited from fraudulently alienating immovables in favour of his patron, but also movables: whereas all idea of fraud is quite out of the present question.

6. If many co-parties to the same suit have together "contested" it, *Berlichius, decis. 132.*, says that during the pendency of suit, there cannot be a compromise by one of the partners without the consent or

knowledge of the others. BUT THIS VIEW IS NOT BASED ON any probable REASON: for a partner can determine as to his own share at discretion, even if the others are unwilling; whether by alienating it to others, or by pledging it, and has full control of his own share, as is manifest from *l. dudum. pen. C. de contrah. emptione falso* 3. *C. de commun. rer. alienat.* (C. 4. 52) *l. juris gentium* 7, § *adeo autem* 6, in *fine ff. de pactis* (D. 2. 14), and much more does IT SEEM that the same ought to be allowed in the case of a compromise, as being something that is favoured, and tending to lessen lawsuits. Nor is a confirmation of his view to be sought in this, that there is a quasi-judicial contract as it were, from which quasi-contract the laws do not allow one party to recede without the consent of the other, *l. licet* 3, § *idem scribit* 11, *ff. de peculio* (D. 15. 1.), joined to *l. sicut* 5 *C. de oblig. et action.* (C. 4. 10.). For though I READILY CONCEDE that there can be a quasi-judicial contract between a plaintiff and a defendant: as to which the said *l. 3. § 11.* also speaks: yet the law does not any the more assume a quasi-contract between many co-parties to the same suit together contesting that suit, than between many co-sureties together interceding for the same debtor with the same creditor. MOST INEPTLY do some strain in favour of the opposite view, the words of the law *alienationes* 13, *ff. familiæ erciscundæ* (D. 10. 2.), where it is laid down that "alienations are interdicted after trial begun" (*Judicium acceptum*): for Papinian did not there mean otherwise than that during the pendency of a suit for apportioning an inheritance, or dividing anything held in common between co-heirs, none of them was allowed, without the others' consent, to transfer his share to a stranger; consonantly with the first lex of the *Code de communi divid.* (C. 3. 37.) As there is no such divisory proceeding where many, from one side, together carry on a suit against others, you must hold to the rule which allows every one the power of alienating his own part.

7. Treats as to alienation by a "vassal" of a "feudal" right. Omitted therefore as of no present application.

8. There is almost a similar doubt as to a fiduciary heir, whether he can, as to the fideicommissary (trust) things to be returned, and during the pendency of the fideicommissum (trust), so compromise, without the consent of the fideicommissary heir, that such compromise will operate against the latter after the condition (of the trust) is passed and the restitution is made. IT SEEMS to accord with the reason of the law that it should be so: provided only that the (remitted) right was clearly doubtful, and provided that no *mala fides* appears on the part of the fiduciary heir, and no remission of a manifest right. For if it be allowed to tutors, curators, and other administrators of others' things to act to the loss (*ut noceant*) of their principals, as has been before said, much more ought this to be permitted to a fiduciary, who is in respect of the fruits of the inheritance, not only an administrator for another's benefit, but for his own benefit too; nay, indeed, acts meanwhile as the

owner of the estate goods, and may even for ever remain the owner, if the condition of the fideicommissum is unfulfilled, or the person in whose favour the fideicommissum is made, does not emerge. This opinion can be clearly gathered from *l. ult. ff. h. t.*, for as it is there said, that a compromise interposed, after the restitution of the inheritance, between the debtor to an estate and the fiduciary heir, ought not to injure the fideicommissary heir unless the debtor were unaware of the restitution made, it is to be sufficiently inferred from the argument to the contrary (*a contrario*) that if restitution be not yet made, a compromise *bonâ fide* interposed will remain valid. In the same way that a lawsuit begun (*lis mota*)* by the fiduciary before restitution injures the fideicommissary, not that suit which is only begun after the restitution, *l. si patroni 55, §. ult. junct. l. facta 63, § si heres 2, ff. ad S. cons. Trebell. (D. 36. 1.)* Nor does this the less appear from the argument taken from "a compromissum" (mutual promise), for since the fideicommissary heir is bound to uphold this when made by the fiduciary, *l. cum hereditas 36 ff. ad Scons. Trebell. (D. 36.)*, there is no reason why he should not also make a valid compromise also. Especially as a compromise is much more easily upheld than a compromissum arg. *l. fratris 10 C. h. t. (C. 2. 4)* joined to *l. non distinguemus 32, § de liberali 7 ff. de receptis (D. 4. 8.)* And although it is true that what is done between others ought often not to injure a third party ("res inter alios, *l. Sepe 63 ff. de re judic. (D. 42. 1.) l. imperatores 3 ff. h. t. (D. 2. 15)*), yet as it is uncertain, while the condition of the fideicommissum is suspended, whether anything will ever come to the fideicommissary heir from the subject matter of the fideicommissum, since the fideicommissary may die before the fiduciary heir, or the fideicommissum may prove wanting in any other way, it is therefore unnecessary that there be required, and made necessary, for the compromise, the consent of him who only meanwhile cherishes a fleeting and uncertain hope of acquiring the fideicommissum. And much more does this hold good when a fideicommissum is found left, not to a certain person, but generally "to those who will be nearest related on the arrival of the suspended day or condition." And thus we also see in other branches of the law that those who have a *jus in re*, even temporary, can by their acts injure others also having a *jus in re*, also a present one. An hypothecary creditor, to whom an undivided part of an estate has been pledged by one of the owners, can certainly, if called to a division by another owner, by a *bonâ fide* bidding overbid another bidding less, or be out-bidden, and thus either acquire the ownership of the whole estate even against the debtor's will, or transfer the part of the debtor, even against his will, to another owner of another part: even though it be a voluntary act to outbid or be outbid, and an act not much different from transactions: *l. communi dividundo, § 7. si debitor 13, ff. communi divid. (D. 10. 3.)* As therefore a creditor can

* For a very clear exposition in English of the scope of the term, "*lis mota*" and kindred terms, the reader may consult *Taylor on Evidence*.—[TRANSL.]

injure a debtor, although an owner, to whom on the payment of the debt the thing is to revert, I do not thus see why, with equal and greater reason, a fiduciary cannot by *bonâ fide* compromise create a right (*jus facere*) binding on his fideicommissary. This is confirmed by the fact that *bonâ fide* expenses made during the pendency of the condition of the fideicommissum by the fiduciary, in respect of the fideicommissary things, are to be made good by the fideicommissary and restored to the fiduciary: *l. qui exceptionem* 40, *si pars* 1 ff. *de conduct. indeb.* (D. 12. 6.) As is also the case with promises and payment made to creditors, so that estate things can also be alienated for the payment of debt, notwithstanding the fideicommissum, *l. filius familias* 114 ff. *Divi* 14 ff. *de legato* (D. 30. 1). *l. cum hereditas* 36 ff. *ad Senatusc. Trebell.* (D. 36. 1.), because only a fiduciary, and in no way a fideicommissary, can during the pendency of the condition of the fideicommissum, and therefore before its restitution, sue and be sued as to estate-goods and the "denunciations" (*denunciationes*) which are to be made by a pregnant widow, on the demise of her husband, for the benefit of those whom it may concern (*quorum interest*), are to be made to fiduciaries only, and not to fideicommissaries: although it advantages the fideicommissaries that a child should not be born, or, substituted, as the inheritance would thus be equally diverted from the fiduciaries and the fideicommissaries, *l. 1 § denunciarî ff. de ventre inspic.* (D. 25. 2.) Lastly, even a sentence passed against a fiduciary will injure the fideicommissary, unless the condemnation has come by the fault of the fiduciary: *arg. l. 1, § denunciarî* 14 ff. *de ventre inspic.* (D. 25. 4.), whether the lawsuit has been commenced, as to a particular thing, or as to the whole inheritance, before restitution, *l. si patroni* 55, § *ult. ff. ad Senatusc. Trebell.* (D. 36. 1.); and for this reason, lest otherwise the ownerships of things should be uncertain, and judicial decisions should be uncertain, as is more fully shown in *Peregrinus de fidei-commissis* art. 53. num. 49. *et. seqq.* If therefore a fiduciary can injure a fideicommissary both by way of payment, by expenses *bonâ fide* incurred, and by a "denunciation" made to himself, there is no reason why, by a *bonâ fide* compromise, made without grace or disgrace, he cannot also prejudice him: especially if we remember that a compromise is as much intended for settling a lawsuit as is a judgment, and that its authority is not less than that of a judgment: *l. 2. ff. de jurejurando* (D. 12. 2.). And this is also the view of *Corasius Miscell. libr. 2. cap. 19. num. 10. Peregrinus de fidei-commissis, art. 52. num. 88.* Nor is it opposed to this, that although a judgment given against a purchaser in a case of eviction operates against his "author," a transaction and "compromissum" do not so operate against such author: *l. si dictum* 56, § *si compromiserò* 1. ff. *de evictionibus* (D. 21. 2.) joined to *l. si cum questio* 17, *C. cod. tit.* (C. 8. 45.) And a judgment given in a question of inofficious testament against the instituted heir will operate against the legatees, who will, however, not be prejudiced by a lawful "transaction" interposed between

the instituted and the legal heir: *l. si suspecta* 29, *pr. et § quamvis* 2 *ff. inoff. test.* (D. 5. 2. *l. a. sententia* 5, § 1, *et seqq. l. si periusori* 14 *ff. de appellat.* (D. 49. 1.) *l. imperatores* 3 *pr. ff. h. t.* (D. 2. 15.) For as regards the transacting purchaser, it may without rashness be assumed that the compromise was not made by him without the wish of the author who was not only principally risking, and bound as to eviction, but was probably more rightly aware of the defences of the thing sold: to him also, on that account, denouncements had to be made that he might assist the suit: whereas, on the other hand, the rights of the deceased and of his succession would be equally, nay more, unknown to the fideicommissary than to the fiduciary, and it is more to the advantage of the fiduciary than of the fideicommissary to whom and on that account the denouncement is to be made, as stated: *l. 1. § 14 ff. de insep. ventre* (D. 25. 4.). And as regards a compromise made as to an inofficious testament, it is not surprising that it is neither injurious to the legatees nor to liberty, for an inofficious testament is not *ipso jure* null, but retains its force until it is rescinded by judicial sentence, and the instituted heir once having bound himself by adiating the inheritance under such testament, to pay the legatees cannot, by transaction, escape from such burden, wholly or in part; for it is certainly clear that whatever was from the beginning due by way of legacy continues, wherever the legatees are able to prove the validity of the testament. And the right of the legatees is clearly distinct from the right of the heir compromising as to an inofficious testament; for he does not vindicate to himself any part of the estate, but claims individual things by an individual title: whereas on the other hand the right of the fideicommissary heir is clearly the same as the right of the fiduciary, and all the advantages and disadvantages simply pass from the fiduciary to the fideicommissary, whatever they are; hence it is commonly disputed whether you succeed to the burdener or the burdened, by fideicommissum; so that therefore a fiduciary transacting as to his own right cannot be said not to seem at the same time to have compromised as to the right of the fideicommissary, who has, and measures, all his right from and by the right which belonged to the fiduciary. The FIDUCIARY HEIR WILL MOSTLY ACT MORE PRUDENTLY in the meanwhile, and more safely, if he abstain from all compromise, and allows all controversies to be decided, by judgment, according to the rigor of the law, although it cannot be denied that it would be hard that a fiduciary should be bound by litigation to expose himself to the fear of losing all if he succumbs, when he could by compromising have retained part; especially as compromises are to be commended in law, and the modest resolve of him who abominates lawsuits cannot be said to be blamed: *l. item si* 4, § *itemque* 1 *ff. de alienat. jud. mut. causa facta.* (D. 4. 7.)

9. And this is even so if the fiduciary have compromised with others claiming the inheritance or a particular thing, or with estate-debtors and creditors, as to a doubtful right of his own or of the deceased. But if a compromise has taken place between a fiduciary and a fideicommissary

as to the fideicommissum itself, because of an uncertain event, or because a doubt existed owing to the obscure words of the fideicommissum, it will without doubt prejudice the compromising parties and their heirs, namely those bound to obey the will of the deceased: *l. 1. cum proponas* 16 *C. de pactis* (*C. 2. 3.*) *l. de fideicommisso* 11 *C. de transaction.* (*C. 2. 4.*) *arg. l. cum a matre* 14. *C. de rei vend.* (*C. 3. 32*) *l. venditrici* 3 *C. de reb. alienis non alienand.* (*C. 4. 51.*) *l. sive possessio* 14 *C. de eviction.* (*C. 8. 45.*) *l. ex qua personā* 149. *ff. de regal. juris* (*D. 50. 16.*) *l. Seja fundos* 73 *ff. de eviction.* (*D. 21. 2.*):—that the old law is altered whereby a compromise as to a reciprocal fideicommissum was reprobated, Paul witnesses *recept. sent. libr. 4. tit. § 13.* Nor does it matter that mention was made of heirs in compromising, or not, since in a doubtful case every one is taken to have pacted not only for himself but for his heirs also: *l. si pactum* 9 *ff. de probation.* (*D. 22. 3.*) *Peregrinus de fidei commiss. art. 32. num. 96, 97.* Clearly, if any one thought that the inheritance of the compromiser ought to be rejected, or had even adiated it with the added benefit of inventory, it seems that he would not suffer any prejudice by the compromise, since as he did not adiate he could rightly go against the act of the deceased: *arg. l. cum matre*, 14 *C. de rei vindic.* (*C. 3. 32.*) *l. sive possessio* 14 *C. de eviction.* (*C. 8. l. venditrici* 48.) 3 *C. de reb. alien non alienand.* (*C. 4. 51.*); and inasmuch as anyone entering on an estate under inventory preserves all his own rights as intact as if he had not adiated the inheritance, as is more fully laid down in *tit. de jure deliberandi* (*tit. 28. 2.*) *Peregrinus d. art. 52. num. 97.*

10. You may compromise as to doubtful things, that is, as to which there is a doubtful right and a doubtful event; or as to an uncertainty of a condition even already pending, although there be at the time no suit existing or feared; as, for instance, a compromise between a fiduciary and a fideicommissary as to a conditional fideicommissum, as has already been said: *l. 11 C. h. t.* (2. 4.). Or you can compromise as to the doubtful and uncertain victory of a suit begun or to be begun (*l. cum te proponas*, 2 *C. h. t.*), even if perchance the thing as to which the compromise is made is naturally defined: inasmuch as you can not only compromise as to general matters, such as an inheritance, rendering of accounts, and the like: *l. 2, 3, 4, 5, 6. C. h. t.* (*C. 2. 4.*); but also as to a defined individual thing, say the Cornelian estate, a debt of a hundred aurei, and the like (*l. si de certa re* 31 *C. h. t.*), nor do I doubt that you can compromise as to conditions of slavery and freedom, etc., etc. (*abolished and therefore omitted*).

11. You cannot rightly compromise as to things which are certain; and therefore not after judgment, whenever it has passed into *res judicata*, so that there is no longer any opportunity of appealing, or when restitution is not yet sought against *res judicata*. For if appeal can still be interposed, or if it can be denied that there is an adjudication, or if there be a fear of restitution being obtained against a judgment, such restitution having already been prayed, in these cases

there may even still be a compromise as of a thing that is yet doubtful *l. et post 7 l. post rem. 11 ff. h. t. (D. 2. 15.) l. si causa, 32 C. h. t. (C. 2. 4.)*; add *Vinnius on transactions, cap. 4. num. 5-9*. But just as by the Roman law a compromise as to a judgment was strengthened whenever by means of the Aquilian stipulation, etc., following acceptance, the right gained by a judgment was ipso jure destroyed *d. l. si causa. 32. C. h. t. (2. 4.)*, or a gratuitous pact as to a judgment was approved, as being a liberating pact, and framed for the sake of donation: *l. jurisgentium 7. § si paciscar. 13, ff. de pactis (D. 2. 14.) Paulus recept. sent. libr. 1. tit. 1. § ult.*; so also it is OUR LAW NOWADAYS that compromises as to a matter which is certain by judgment are valid, *Groenewegen ad l. 7. § 1. ff. h. t. num. 2*. Nor is it doubtful that when a surety is already condemned, the principal, not yet condemned, can effectually compromise, inasmuch as the compromise would be beneficial not only to the principal debtor, but to the condemned surety, such compromise being an agreement framed in rem (*l. et post 7. § 1. ff. h. t.*).

12. As to what is left by testament, and generally as to controversies arising out of a testament, there can neither be a compromise, nor can the truth be otherwise accurately inquired into than by inspecting and becoming acquainted with the words of the testament (*l. de his 6, ff. h. t. D. 2. 15.*) [In an excursus, one of those referred to *ante*, and not now translated here for the reason there given, Voet argues this, adding as a reason] . . . lest otherwise the bounties of deceased persons should be too rashly and inconsiderately spurned, and their last wishes, thus overcoming the expectations of them formed by those benefited; and lest last wills should be overturned: for that these should have effect is both to the private interest of testators and also to the public interest *l. vel negare 5. ff. testam. quem. adm. aper. inspici. et describ. (D. 29. 3.) pr. Instit. ad leg. Falcid. (I. 2. 22.)*

. . . but where a compromise is made as to a fideicommissum and codicils are afterwards found, from which it appears that a greater quantity is due by reason of the fideicommissum, the fideicommissary can yet obtain what he had lost through the compromise. For although the testament was opened and inspected, and although any one would have thought that it was therefrom perhaps to be concluded that by legal interpretation the codicils also were to be regarded as opened and inspected, as accessories of the testament, and should follow the law of the testament according to *l. ab intestato 16 in fine et l. 18, ff. de jure codicill. (D. 29. 7.) l. per. ff. testam. quemadm. aper. insp. et describ. (D. 29. 3.)*, yet it has MORE RIGHTLY been thought that even the very codicils in which the quantity of the fideicommissum was expressed ought to have been inspected: and because this was not done in the case of the said *l. 3, § 1*, the compromise bore no prejudice to the fideicommissum. Just as it is against the law (*in civile*) to adjudicate or "respond" on any one particular part of a law put forward, unless the whole law has been viewed as a whole, *l. in civile 24, ff. de legibus (D. 1. 3.)*,

so also it is disapproved of that you should adjudge or transact without having inspected and become acquainted with all the parts of the last will (which is considered as corresponding, in itself, to a law, according to novell. 22, cap. 2). And that this should be so observed, witness *Peregrinus de fideicommissis*, art. 52. num. 57. *Sande decia. Frisic. libr. 4. tit. 3. defin. 15; ante, med.; Ant. Faber. Cod. libr. 2. tit. 4. defin. 1. Andr. Gayl. libr. 2. observ. 139. num. 10. Christinæus, vol. 1. decia. 84. num. 12 et seqq. Hugo Grotius, Manuduct. ad Jurisprud. Holland. libr. 3, cap. 4, num. 9. Vinnius de transaction. cap. 5. Respons. Ictor. Holl. part 3, Vol. 2. consil. 14. num. 3, 4, nor is the l. Lucius Titius 78, § ult. ff. ad Senatusconsult. Trebell. (D. 36. 1.) opposed to this, for that does not treat of codicils afterwards found, but of those instruments from which the greater quantity of the patrimony would appear; for it is the "last will" which appears from the codicils and not the quantity of the substance. Far less is there any opposition in *l. non est ferendus* 12 ff. h. t. (2. 15.), for it is one thing to say that he reflected only on what was legated in the first part of the testament and not on what was legated in the latter part, and another thing to say that he only inspected the first part: for he who inspected the whole and compromised generally as to what was left in the testament might indeed *profess* that he had only thought of what was left in the first part, but yet "this is not to be tolerated," as the jurisconsult with indignation witnesses: his ignorance would, however, have been sufficiently likely, and not to be rejected with indignation, if he had only inspected the first part, and nothing beyond.*

13. Nor can any one, in compromising, rightly renounce this inspection of the testamentary tablets; for though the laws allow every one to renounce what is for his own benefit, yet he cannot renounce the right of a third party, nor a public right, which would be the case here, as we have said that an inspection is required in order that the resolve (*judicium*) of the testator should not be rashly subverted, nor the wills of deceased persons, which it is both to the interest of the testator and of the public should have effect given them, should be hidden *d. l. 5 ff. testam. quemadm. aper. inspic. et describ. (D. 29. 3.) d. pr. Instit. de lege Falcid. (I. 2. 22.) Peregrinus de fideicommissis d. art. 52. num. 78. Sande d. libr. 4. 5. tit. defin. 15. ante med. Andr. Gayl. d. libr. 2. observ. 139. num. 10. Christinæus d. vol. 1. decia. 84. num. 13, 14. Vinnius de transact. cap. 5. num. 7 et seqq.* If, however, the wish of the testator can, without inspection, become otherwise certainly known to the compromising parties, the compromise will stand: since he who is not ignorant, but already certain, cannot seem to be made more certain: *arg. l. 1 in fine ff. de action. emti (D. 19. 1.) Ant. Fabr. Cod. libr. 2. tit. 4. defin. 1.* Hence if a nuncupative testament were made, then, inasmuch as there could not be an inspection of the testamentary tablets, it will suffice that in the hearing of witnesses the wish of the deceased should have been known, and thoroughly understood, by the compromising parties. *Vinnius de transact. cap. 5. num. 6.* Nor does a gratuitous pact before

the tables are inspected seem forbidden; nor a simple renunciation, or repudiation of the things left (the relicts) (*relictorum*); because an individual right which is the subject matter of a compromise, is not to be prolonged in its consequences; and commonly, it is allowed to every one to renounce his own right. *Vinnius de pactis, cap. 18. num. 6 et de transact. cap. 5. num. ult.*

14. As regards "aliment," if it is due by contract, there is nothing prevents it being taken away by mutual transaction without the prætor's decree, for the obligation to furnish it was introduced by mutual consent; as moreover in this case it is not another's, but one's own right, which is renounced; and it is natural that anything should be dissolved in the same way in which it was bound together: *l. cum lib. 8, § hæc oratio, 2 ff. h. t. l. nihil tam naturale 35, ff. de regul. juris (D. 50. 17.)* But if aliment have been left by last will, and if delay has occurred in furnishing it, so that aliment is due for the past, for say two years or other time already flown, there is then no need of a decree for compromise, because the aliment has ceased to have the nature of aliment, and have become clothed with the condition of a simple legacy, and therefore ought not to be judged according to the law of aliment, for no one lives, or is to be alimented, in the past: *l. de alimentis 8 C. h. t. (2. 4.)* But if they are to be granted for the future, by testament or (which is the same) by codicil, or by donation *mortis causâ*, or any taking (*capione*) *mortis causâ*, the compromise will not otherwise be valid than if there be an added decree of the prætor; lest those to whom aliment is left should not rashly compromise, and, induced by the allurements of present reward, be content with a little, and thus the pious and provident wishes of a testator, granting aliment, be subverted, *d. l. cum lib. 8 pr. et § hæc oratio 2, ff. h. t. (D. 2. 15.)*, and the same is the case if a moderate usufruct of aliment have been left, *d. l. 8, § si in annos 23, ff. h. t.* For it must be taken into consideration that parents, and others, who dared not hand over the property in their goods to their children or relatives, prone to luxury, lest through dissipating them in a short-lived prodigality, the children, &c., would be reduced to want, would yet prudently grant aliment by testament in the shape of an annual, weekly or daily allowance. [An epigram from Martial quoted III. 10.] But if the person to be alimented does not, by the compromise, take away or diminish the obligation to aliment, but rather renders his condition better or, at all events, not worse, the compromise will be of force without a decree, since the Emperor Marcus only intended by his decree to guard that aliment should not be taken away by compromise. *Vide l. cum lib. 8, § eam transactionem 6, pr. § pen. et ult. ff. h. t. (D. 2. 15.): confer Vinnius de transact. cap. 6.* So that no one is prohibited from pacting as to them gratuitously: for in that way the reason of the prohibition ceases, nor is any one on that account easily presumed to be about to remit his right gratis, but rather for the offer of a present of money, however small. Add to this that it is free to every one, on general

fundamental principles of law, not to accept the legacies left to him, because either the mode of leaving did not recommend the acceptance, or the scantiness of what was left, or other reasons of that kind, impelled towards the repudiation. Or suppose that an annual, or monthly, aliment of a small quantity be made, as it were to a poor man, but to one who is really rich: which aliment the benefited party could not take without shame? *Donellus ad l. 7. seu potius 8, C. h. t. num. 1. (C. 2. 4.) Vinnius de pactis, cap. 18. num. 7 et de transaction. cap. 6. num. ult.* Although it is the opinion of some that any one can now-a-days compromise as to aliment from whatever cause due: *Zypeus notit. jur. Belg. libr. 1. tit. de transactionibus vers. non potest*, yet it has seemed safer to others that the Roman law should not be receded from in this particular: remembering that it is not exactly needed that the decree should precede the compromise, but that it suffices that it be ratified by the ratihabition of the magistrate; but if that be both wanting, and it should be apparent that the compromise was interposed to the prejudice of paupers, and that thus, if the giving of aliment were remitted, the party compromising would have to be joined to others to be alimented at public expense, reason dictates that the compromise would be rescinded. *Grotius manuduct. ad Jurisprud. Holl. libr. 3. cap. 4. num. 9. [Maasdorp's Ed.] Groenewegen ad l. 8, C. h. t. (C. 2. 4.) Responsa Ict. Holl. part 3, vol. 1. Consil. 144, cir. fin.* Whenever a compromise is lawfully interposed as to future aliment, by which compromise the obligation to aliment is either diminished or taken away, it receives a strict interpretation: so that in a case of doubt a right to get clothes or a right of dwelling is not supposed to be taken away, but only right to food: *l. cum lib. 8, § qui transigit 12, ff. h. t. (D. 2. 15.)* Although in a legacy by which "aliments" are left, and an obligation to furnish them introduced, it has been laid down that clothes and right of dwelling were also included: *l. legatis 6. l. ult. ff. de aliment. vel cibis. legat. (D. 34. 1.)*; the very great favour to aliment thus bringing it about that it should be very fully and easily introduced, and with more difficulty and more sparsely departed from, when the necessity had once arisen.

15. As to matrimonial causes, also, compromise may be interposed in favour of marriage, but not against it, so as to impede or dissolve it, this the commentators lay down from canon law principles, *arg. C. fin. extra de transactione, Andr. Gayl. libr. 2. observ. 94. num. 14; Vinnius de transact. cap. 4. num. 12.* Nor is it doubtful that now also you would in vain destroy by private pacts, as though it were a private individual contract, a marriage once rightly contracted. But that in a case of doubt, the uncertain hope of a future marriage, based on doubtful spousals, can be removed by means of "transaction," and that on something being given, it is dissolved and vanishes, is not prohibited by law, and is with us matter of daily occurrence.

16. Compromise is not allowed as to future delicts or future fraud;

that being as it were an invitation to crime : *arg. l. si unus* 27, § *pacta quæ* 4, *ff. de pactis* (D. 2. 14.) *l. si a reo* 70, § *ult. in fine, ff. de fidejussoribus*. (D. 46. 1.) As to private past delicts a compromise is so far permitted that the obligation of pecuniary fine is taken away, but not to avoid infamy (rest obsolete), the system of fines for crime going wholly to private persons being exploded.

17. As to public crimes, non-capital, it is also forbidden to transact, under penalty of being convicted. *l. transigere* 18 *C. h. t. (C.) l. ult. ff. de prævarication. except. crimen falsi*. (Rest of passage an excursus argumentative and law obsolete.) (Will be put in "appendix of excursus.")

18. As to capital crimes entailing absolute death, and not merely civil death, it was allowed to compromise by the Roman law, except in case of adultery and abduction. [Here follows a very learned *excursus* in support, but containing nothing of modern effect, necessitating its translation here.] [Especially since the decision.]*

19. Except as to adultery it was, by the Roman law, allowed to both plaintiff and defendant to compromise. [Here follows another similar *excursus*, the only portion of which it is thought desirable here to translate is the one passage on Col. 1, p. 191, where it is shown (by way of analogy to a certain other proposition of the text under discussion), that : There are many things in our law which are permitted and allowed : than which other things, had they been rather done, would have been more approved and lauded. It is permitted, for example, to a seller to throw out wine, at the risk of the purchase, if the day appointed for measuring it out have passed by, and no measurement have meanwhile taken place : notice of such pouring out having been given to the purchaser, but if, when he *could* pour out he did *not* so pour out, he is rather to be praised, &c. : *l. 1, § pen. et ult. ff. de peric. et commodo rei vend.* (D. 18. 6.) It is allowable for the contracting parties in purchases and sales to circumvent each other (*se circumvenire*) if only there be no "enormous loss" beyond the half ; yet it is more right and honest so to act that the price accord as much as possible with the thing, which the law will also order when there is too great and too manifest an irregularity apparent : *l. in causa* 16, § *idem Pomponius* 4, *ff. de minor. 25 annis* (D. 4. 4.) joined to *l. 2 C. de rescinden. vend.* (C. 18. 5.) *l. unde si Nervæ* 79, *ff. pro socio* (D. 17. 2.) The imperial constitution desires that a broker, or a persuader of marriages, should not take anything on that behalf : but if he at all agreed to take anything he can by pact exact up to a certain quantity : *l. ult. C. de sponsal.* (C. 5. 1.) From the analogy of these passages the text deduces at length that though it is better not to compromise a capital crime, yet it is not illegal. Relatives may compound ; but the law avenges, *pro populo*. This was so by the Roman law. By the law of Holland the injured party, or his heirs, children, wife (as to whom see more fully in *tit. ad*

* In *Thomas v. The Queen*, Appeal Court, Capetown, January, 1883, it was held, on a point reserved, that compounding a crime is itself a crime.—[TRANSL.]

leg. aquil. (ix. 2), num. 11 and *tit. de sent. passis* (tit. 48. 23.) num. 9.) could, without any distinction being drawn, whether it were a public or a private crime, whether it were capital or not capital, compromise with the injuring party, in as far as a civil action for indemnity, or for "what it profited," was competent from such injury. *Grotius manulect. ad jurispru. Holl. libr. 3. cap. 4. num. 01. Groenewegen ad l. 18 C. t. h. Joh. a Someren de jure novercar. cap. 15 num. 7. Ant. Matthæus de criminibus, libr. 48. tit. 20. cap. 4. num. 12*, so that neither was the husband prohibited to compromise as to his wife's adultery, of which he was ignorant from the beginning; whether with the wife, or with the adulterer himself, without incurring the vice of pimping. *Carpzovius pract. criminali, part 2. quæst. 71. num. 31. et seqq. Petrus Heigius, part. 2. quæst. 29. num. 79. et seqq.* But as this compromise is only of legal force between the compromising parties themselves, it cannot therefore prejudice those to whom the public accusation is now committed by the custom of any region, and to whom alone the right of accusing competes, to the exclusion of private persons: it cannot so prejudice that by solemn reference to the judge the recovery of the legal or discretionary penalties of the crime is prevented.* Although these public authorities were interdicted with us in the preceding century from compromising as to any crimes, both because innocent persons were often in that way exposed to being threatened, and because the richer were invited to crimes which might be compromised then by money and not by punishment *Ordon. op. de crimineele Institie van Kon. Phillipus anno 1570. art. 13. vol. 2. placit. Hol. pag. 1014*, yet afterwards compromises of lighter crimes began to be permitted to prætors and the like: so also was compromise legally made as to many more serious crimes by consent of the princeps, or of the chamber representing the accounts of the princeps, especially when what was charged rested very greatly on presumption, and not on proof which was very evident and clear as midday light.† *Merula praxi, libr. 4. tit. 14. cap. 2. num. 5. Groenewegen ad. d. l. 18. C. h. t. (2. 4.) Wassenaar pract. Jud. cap. 30. num. 52, 53, 54. Ant. Matthæus de criminib. libr. 48. tit. 20. cap. 4. num. 12* Excepting, however, the crimes of forcible violation, abduction, falsity, blasphemy, and others enumerated in *instruct. Curisæ Hollandicæ, art. 9*. If, however, any one did not legally compromise, concerning more serious matters, with the public accusers or with those privately injured, the matter was then not taken as confessed, but rather had to be convicted of by legal proofs after an accusation publicly instituted after the accusation. For if it is allowed nowadays to compromise as to lighter crimes, he does not err, and is not to be punished with the penalty of one convicted or confessed who compromises where the law permits. And although such an one was regarded, as far as the consequent stain of infamy was concerned, as one who had confessed *l. 4. § ult. l. 5. ff. de his qui not.*

* Vide App. Court, Case Thomas v. The Queen, *ante*.

† This is virtually no more than the A. G. declining to prosecute.

infamia (D. 3. 2.) that does not take place nowadays, for now no infamy is *ipso jure* a consequence without a condemnatory sentence of the judge, as stated in *tit. de his qui not. infam.* (tit. 3. 2.) And if you take the case of the most serious crimes, as to which, mention being made of them in the said art. 9, it is forbidden to transact, yet it would seem that there may be a compromise as to these, not so much from a consciousness of crime as rather on account of the uncertain danger of death, sometimes imminent even to the very innocent on account of another's calumny; and inasmuch as the penalty of "confession and conviction" is not found annexed to the prohibition, in respect of those contravening, we should rather think that, the provision of the Roman law not being in that case changed, it should be adhered to, that those transacting as to capital matters should never be taken as "convicted." *l. ult. ff. de prævaricatione* (D. 47. 15.): *Anton. Faber, Cod. lib. 2, t. 36. defin. 2. in med. Mynsingerus, art. 6. observat. 22.*

21. The effect of compromise is that it destroys a lawsuit, and has the force of *res judicata*, or of an oath between the compromising parties: *l. 2, ff. de jurejurando* (D. 12. 2.) But it must receive a strict interpretation, so that it does not exceed the matters and causes as to which it is nominately framed, nor the pecuniary sum as to which there is a dispute. Hence, although there may be a compromise as to a debt, or as to a "universal remainder," without designation of the quantity in doubt or in litigation, and although in this way the whole possible question in issue may be settled, yet if there be a transaction, "as to a thousand pounds" as the residuary amount or debt, entered into with a tutor or any similar administrator, or with a debtor, and afterwards the quantity of "the remainder" or of the debt be proved to be greater, the recovery of that which exceeds the thousand aurei will not be taken as barred by such compromise, *l. qui cum tutoribus 9, § transactio 2. et 3. ff. h. t. (2. 15.) l. age 3 C. h. t. (2. 4.)* And if a compromise be interposed, as to an inheritance, between brothers or others, on the basis of *all* the estate goods being divided between them, and afterwards it appear that something has been removed by one, it is taken that the action as to what has been removed will remain over; since the things removed were not even thought of, and there cannot seem to be a compromise as to what is not thought of: *l. tres fratres 35, ff. de pactis (2. 14.) Vide Grotius manuduct. ad Jurisprud. Holl. libr. 3. cap. 4. num. 13. Respons. Jurisc. Holl. part 1. consil. 229. et part. 3. vol. 1. consil. 31. Sande decisis. Frisic. libr. 4. tit. 5. defin. 15. post med.* Much less can the effect of a compromise extend to *future* matters, as to which there has been no thought. *Brunemannus and the commentators generally on d. l. g. ff. h. t.* On the same reason of strict interpretation is it founded, that if a reconciliation by way of compromise intervene between the wounder and the wounded, or one causing an injury, the action nevertheless would continue perfect for the recovery of expenses and that which it profited unless the fullest release had been made, as is laid down by *Christineus*

ad Mechliniens. tit. 2. art. 31. num. 11. Menochius, libr. 3. presumpt. 114: Jul. Clarus, recept. sent. libr. 5. § sin quæst. 58. num. 38. Mynsingerus cent. 4. observ. 10. Because, also, you cannot easily presume as to a compromise having been entered into, as to anything, and therefore, if between many brothers who are co-heirs, and burdened by a mutual fideicommissum, a division of the estate has been made, and a pact added to the division "that the goods of each one shall be his own," and "that no one shall contravene the division," the chance of an uncertain fideicommissum DOES NOT SEEM to be taken away by such transaction: especially since it is one thing to divide and another to remove a fideicommissum, *l. si cum patr. 77, § hereditatem 18 ff. de legatis 2, (D. 30. 2.) arg. l. si unus 27, § pacta 4 in fine, ff. de pactis (D. 2. 14.)*; unless the words of the pacts and clauses have been so generally framed that they cannot, without falsehood and perverting the reason of correct speech, be restricted to one division only. *Neostadius curiæ supr. decis. 43. Andr. Gayl. lib. 2. obs. 139. num. 1. et seq. Anton. Faber, Cod. libr. 3, tit. 25. defin. 1. Fachineus, libr. 5. controuv. cap. 20. Sande decis. Frisic. libr. 4. tit. 5. defin. 14. Menochius, libr. 3. præsumpt. 115. num. 9. et seqq. Wamesius, tom. 6. consil. 82. num. 24. et 36. Fusarius de subtit. quæst. 587. Christincus, vol. 2. decis. 180. num. 8. et seqq. Wasseraer pract. judic. cap. 11. num. 62. Brunnemannus ad l. 11. C. de transact. cap. 8. num. 19, 20.* Nor is the response given by Scævola in *l. qui Romæ 122, § ult., ff. de verb. oblig. (D. 45. 16.)* opposed to this, because he does not settle the question whether a compromise is taken as having been made, by division and a penal clause, as to a fideicommissum, or not; nor even this point whether it has been well or rashly adjudged that a compromise has been made as to a fideicommissum also. But rather is this alone enquired into, has the penalty agreed in the case in which one of dividing brothers acts contrary to the division become exigible; and he answers that it has become exigible, and for the best reason: for when it has been decided, as laid down in the law, that the recovery of the fideicommissum was extinguished by the division, and that a judgment, whether legally or illegally interposed, is taken for proof, it cannot but appear that the brother seeking the fideicommissum acted contrary to the division; and as a penalty was agreed in case of contravention, and as the contravention appears by the judgment, it was necessarily "answered" that the penalty had been incurred. *Vinnius, d., num. 19.* But if two persons, having fully inspected the testamentary tablets, divide the fideicommissary things between them at a time in which the condition of the fideicommissum was already purified, they not being ignorant thereof, there cannot be otherwise than an assumption of a compromise as to a fideicommissum and a remission. Thus it happens that one buying in ignorance a thing unconditionally left to him, can still recover the thing legated, or at least its price: not, however, if he had known of it: *arg. l. hujusmodi 84, § si servum 5, ff. de legatis 1. (D. 30. 1.) jurit. l. suæ rei 16, ff. de*

contrah. emp. (D. 18. 1.): for if he who knowingly buys a thing which has been unconditionally left to him, defeats his own legacy: why should not a division made by one knowing his right also defeat an unconditional legacy. *Menochius, libr. 3. præsumpt. 115. num. 3. et seqq.*

22. Just as the compromise must not exceed the matters as to which it is framed, so it cannot prejudice others than the compromisers themselves, according to the commonly accepted rule that "*res inter alios acta*"—what is done between third parties—can neither benefit nor injure others: *l. 63, ff. de re judicat.* (D. 42. 1.): *tot. tit. Cod. inter alios acta vel judicata aliis non nocere* (C. 7. 60.), *l. si unus 27, § pacta 4. in fine ff. de pactis* (D. 2. 14.), *l. imperatore 3, ff. h. t.* (D. 2. 15.) On which basis it has been "answered" (*responsum est*), that the compromise of only one partner or co-heir should not prejudice the others who do not direct or ratify it; nor will the party compromising, if he have not given security as to ratifying (*de rato*) be bound to fulfil the compromise beyond his share, nor can he be bound to "that which it profiteth" him that the others did not stand by their agreement, but only for the expenses, if it appear that any have been made in respect of such compromise. *Respons. Ictor. Holl. part 2, consil. 42.* And if there be a contention between the heir instituted by testament and the legal heir as to the validity of the testament, i.e. whether it shall be declared inofficious, or not legally made, or false, or to labour under any other defect, and be "useless," and if by compromise the controversies be departed from, so that the instituted heir gets part of the estate by force of the compromise, and the legal heir part, the legatees will not be prejudiced by such transaction from instituting an action *in solidum* for the recovery of the legacies against the heir instituted by the testament; provided only they prove that the will existed. For it is not every adiation made by the instituted heir that makes, and keeps, the instituted heir subject to the burden of the legacies; but only that adiation which happens by testament, and able to have effect without the will of others; lest otherwise we should declare him who adiates bound by false and inofficious or broken (*ruptis*) testaments, or testaments *ipso jure* null; and this contrary to the laws which grant the condition of legacies that are not due, *l. si quis sic solverit 2, § 1. l. 3, 4. l. ex his omnibus 54, ff. de condict. indeb.* (D. 12. 2.) And this is what the Emperors lay down in *l. imperatores 3, ff. h. t.* (D. 2. 14.) for, premising as a rule that "the rights of others are not injured by private pacts," they advance this kind of example in regard to legatees. For unless it be proved that a testament existed, and though you deny that there is some one else adiating it, it could not be disputed whether the right of the legatees could be injured, a right then never acquired by them, for "there is no affection of that which does not exist;" hence also in *l. si suspecta 29, § quamvis 2, ff. inofficioso testam.* (D. 5. 2.), it is said that notwithstanding a compromise the "testament stood in its own right," and therefore the legacies and the bequests of freedom were of force (*salvas*).

From which it is inferred that they ought legally to prevail, for it would ineptly be said that "the testament stood in its *own right*," if it had never been rightly framed. And this is the reason that in the beginning of the said *l. 29*, it is permitted to legatees who fear collusion to be present at a suit as to an inofficious testament, and to defend the will of the deceased as to their own legacies, by showing that the deceased had not sinned against the "offices of piety;" nay, that it is also allowed to appeal if the instituted heir fail: *l. a sententia 5, § 1, et seqq. l. si perlusorio 14, ff. de appellat.* (D. 49. 1.), nay, if the instituted heir willingly yielded to him who raised the complaint, and did not reply to him, and if thus the will were declared inofficious, it has been responded that the freedoms bequeathed yet held good, and that the legacies could be recovered, *l. qui repudiantis 17, § 1, ff. de inoff. test.* (D. 5. 2.), that is to say if the legatees can purge the will from the stain of inofficiousness, because it may be that the instituted heir does not answer to the action, because he was unwilling to litigate rashly, as he was convinced that the testator had acted contrary to "the offices of piety." And, certainly, if you do not exact this kind of proof from legatees, *d. l. 3*, the result will be that by the compromise of private parties a testament will become, or remain firm, which testament from the beginning was useless (*inutilis*), or ought to have been rescinded; and thus the pact of one person would often benefit another having no right; for surely a controversy as to the worth of a testament could not be the less decided against an heir who is instituted (*scriptum*), as for him, if there had been no compromise, but instead, a continuance of the lawsuit unto judgment. And just as a compromise does not injure legatees, according to what has been already said, so neither is it an impediment to estate creditors so as to prevent them from proceeding in *solidum* against the instituted heir if only they prove the validity of the testament; nor, on the contrary, is it a bar as against the legal heir, if only they prove the manifest infirmity of the testament; lest otherwise, by collusion and fraud, a road should be opened by which a pauper legal heir, by fabricating a compromise, should enter on part of the estate and its burdens; or, *vice versâ*, a legal heir should be aided, pacting in part with a suborned testamentary heir. The same reason which applies to legatees applies here also, namely, that the rights of third parties ought not to be injured by the pacts of private persons, and that an agreement entered into with one person ought not to be extended to the detriment of another, *d. l. imperatores 3, ff. l. i.* (D. 2. 15.), *l. si unus 27, § pacta 4 in fine, ff. de pactis* (D. 2. 14.) Nor should it be thought that Scævola, in what he thus lays down in *d. l. 3*, is opposed to himself, and his own reasoning put forward in the said *l. 3* on account of what he has written concerning creditors in *l. controversia 14, ff. h. t.*: for he did not there impose on creditors the legal necessity that they should be forced to institute their actions partly against the instituted heir, partly against the legal heir, for that part, namely, which each one took from the

inheritance by the transaction; but he only responds to this question, *whom* (assuming such transaction) *the estate creditors may sue*. That the creditors could recover their own by many ways and means was nothing new; and thus Scævola, without denying that the estate or legal heir could on proof, according to what has been before said, be sued in *solidum*, yet thought that by law also the creditors could do so if they summoned both the testamentary and the legal heir for the part expressed in the transaction and transferred to each one. For if you substitute for the word "can be sued" for "*can sue*," then the question proposed, and the reasons above advanced, both prove, as also lastly, does the accustomed mode of expression used by juriconsults and approved authors, that no further proof is required. For so in l. 6, § 6, *ff. communi divid.* (D. 10. 3.), when the juriconsult says that the action must be *in factum*, he wishes to convey this that an action can be brought in *factum*; for that you can proceed in that species of case by the action for division of inheritance, or for dividing common property, or by the partnership action, appears from l. 2, § 1, *ff. de religionis* (D. 11. 7.), *et* l. 39, *ff. pro socio* (D. 17. 2.) For this opinion of Scævola rests on an "uncertain right of succession." The instituted heir adiated, and the legal heir adiated too; each defended his own right of succession, but as it did not appear clearly which had the better right, it was deservedly declared an "uncertain right of succession" by Scævola. When such a doubtful suit is entirely compounded by transaction there is certainly no iniquity or absurdity in it that each one should be sued for that part which he had in the inheritance by virtue of the transaction. For as the instituted heir, who could not keep the whole under the testament, saved as much as possible by the compromise, and as the legal heir again, not being able to retain the whole, preferred to keep the part allotted to him by law, than to litigate, where I pray you is the injury if any one desiring the whole inheritance is forced to bear the burdens for that part for which, when he could not have more, he both wished to be heir by transaction and could remain so, must yet be summoned by the accommodated action (*actio utilis*), rather than by the direct action on account of the "uncertain right of succession," since it was uncertain whether the legal heir took his part by testament, and therefore as a true heir, or against the testament from the legal heir; just as he who is not the true heir, but has acquired by sale, transaction, or some other way, a part of the inheritance from one who is the true heir, must be summoned by accommodated and not by direct actions. So the uncertainty of the succession deservedly brings it about that either heir should be rather compelled to payment by accommodated than by direct actions, *d. l. 14*. And although the purchaser of an inheritance is not bound unwillingly to defend the accommodated estate actions brought against him, *l. ratio juris 2, C. de hered. vel act. vend.* (C. 4. 39.), it is different in the present case where although each one wished to be the true heir, yet as such he is on the ground of his wish

still unwillingly bound to bear the actions brought against him again because of an uncertain succession. Nor should any one on this account think that it is thus brought about that an estate is transmitted by pact; for since the right of succession was doubtful, neither can declare himself heir by pact, but one by the law, and the other by testament. And although our law does not allow in the country districts, that the same person should die both testate and intestate at the same time, *l. 7, ff. de regulis juris* (D. 50. 16.), that, it is agreed, can only be so held by looking to the beginning; for as it is not new that it afterwards can be so that a person was partly testate and partly intestate, and that part of the estate remained with the testament, and the other part ceded to the legal heir, and that he was himself considered as the legal heir in respect of that part, as is manifest from *l. nam etsi 15, in fine ff. de inoff. testam.* (D. 5. 2.), it would be in vain to except as in *d. l. 15*, that this had happened not by transaction, but by judgment; for transaction would then have a greater authority than *res judicata*, *l. 2, ff. de jurejurando l. non minor. 20. C. h. t.* (2. 4.), and an inheritance is not any more transferred by sentence than by pact or transaction; but just as in *d. l. 15*, the inheritance was declared to be partly acquired by testament and partly by law, so also it is declared in our case by transaction. Nor is it unusual to find in other branches of the law also that rights which are at variance with each other, yet unite in the same person on account of their uncertainty, as for instance liberty and slavery (obsolete). And this view derives the more force from this, that by our modern law this reason of heritancy drawn from the natural conflict of "testate" and "intestate" entirely ceases, as the freedom is accorded to each one of dying partly intestate. Nor can I doubt that what has been thus said as to creditors being able to sue each of the transacting parties for his share, may be extended also to legatees, according to the latest principles of the law; for although it is intimated in *l. imperatores 3, ff. h. t.*, that they ought to sue the written heir, yet that resulted only from the old fundamental principles of the law by which the legacies could only be given by testament, nevertheless they could be owned by one who was intestate, in no other way than that the written heir of the testament could be compelled to pay what was left by testament, but not he who obtained a share of the inheritance by the title of legal heir, and by law; whence it is said that those "who take anything by testament ought to sue the written heir." But since it was allowed that legacies could not only be left by one who died intestate, but also if given by testament must be given by the legal heir when the instituted heir repudiated, *novell. 1, cap. 1, 2*, there is no longer any reason why legatees should be separated from creditors, but that they should have an equal right with creditors of proceeding both against the legal and the testamentary heir, especially when they themselves, by a quasi contract, namely the adiation of the inheritance, become creditors of the written and the legal heir, for the delivery of the legacy.

23. Another effect of transaction is that it has such force, in favour of settled lawsuits, that neither can causes which have been thus ended be resuscitated by imperial rescript, *l. causas* 16. *C. h. t.* (C. 2. 4.), nor ought what is done by transaction to be recalled on account of instruments "newly discovered," *l. sub prætectu* 19. *l. 29. C. h. t.* (2. 4.), since neither are judgments to be weakened on that ground: *l. sub specie* 4. *C. de re jud.* (C. 7. 52.). *Peregrinus de fideicommissis*, art. 52. num. 99, 100. *Ant. Faber, Cod. libr. 2. tit. 4. de fin.* 13. *et tit. 21. de fin.* 2. *Hugo Grotius manu duct. ad jurispru. Holl. libr. 3. cap. 4. num. ult. Radclantius Curiae Ultraject. decis.* 102. num. 4. *et seqq.*; *adde Sfortiam Oddum de restitutione part 2. quæst.* 73. Nor, if it be afterwards proved that there had been no "cause" for the transaction, and that that which was compromised was undue: because when a lawsuit existed or was imminent, the very recession from the suit seems to be the "cause:" *l. in summa* 65, § *et quidem* 1, *ff. de transact.* (D. 2. 15.) *l. nec intentio* 23. *C. h. t. arg. l. si citra* 2 *C. de condic. indebit.* (C. 4. 5.) *l. si non* 6 *C. de juris et facti ignoran.* (C. 1. 18) *l. si transactionis* 11 *C. de non numeratæ pecun.* (C. 4. 30.) But if the fraud of the adversary have appeared in the compromising, it may be shown in any way, whether by new instruments or any other mode of proof, if there have been a "suppression of documents" by the adversary, or a manifest calumny or just fear: or if the compromise appear to be solemnised with false instruments; or have happened by an error of calculation; then equity demands that loss be averted from him who is circumvented by a rescission of the transaction, unless the compromise were as to the error in the calculation itself. *l. qui cum tutoribus* 9, § *qui per fallaciam* 2, *ff. h. t.* (D. 2. 15.) *in summa* 65, § *et quidem* 1. *ff. de condict. indeb.* (D. 12. 15.) *l. actions* 4, *l. interposita* 13, *sub prætectu* 19, *l. pen. C. h. t. l. unica C. de errore calculi* (C. 2. 5.) And this is so lest otherwise sordid extortioners, interdicted by law, should be favoured: *l. 1, § 3, ff. de calumniator.* (D. 3. 6.) *Papon. libr. 16. tit. 3. in appendice arrest.* 3. *Ant. Faber, Cod. d. libr. 2. tit. 4. defin.* 13. *Hugo Grotius inter Respons. Ictor. Holland. part 3, vol. 2, Consil.* 304, *revera* 204. num. 1, 2. *Peregrinus de fideicom. art. 32. num. 201. Stockmans, Curiae Brabant decis.* 137.

24. But if there be no concurring fraud or chicane (*calumnia*) of the adversary and yet enormous loss, over the half, happen by the compromise, our law does not allow that the compromise shall be rescinded on that account alone; nay, not even when a fourfold greater amount of debt be proved will the transaction be weakened: *l. Lucius Titius* 78, § *ult. ff. ad Senatuscons. Trebell.* (D. 36. 1.): nay not even if it is proved that no debt at all existed at the time of the transaction; for surely there was always a sufficient "cause" for the "giving" (*datio*), viz. that thereafter there should be a departing from or abstaining from, the suit, according to what has been said before: *l. 23, C. h. t.* (C. 2. 4.) *l. in summa* 65, § *et quidem* 1, *ff. de condict. indeb.* (D. 12. 15.) On this

ground the recovery of what is unduly paid is not allowed in those cases in which, on account of denial made, the suit grew two-fold; if when sued for the double amount you pay the single amount. There then appears to be a compromise as to the otherwise inevitable rendition of the two-fold amount inevitable by reason of the "denial:" *l. ult. Instit. de obligat. ex quasi contracta* (I. 3. 27.) Add to this, that as a doubtful matter was requisite at the time of the transaction, and there cannot be a compromise as to a thing which is certain, it cannot with sufficient aptness be said what at that time the single amount was, the uncertain issue of the suit not admitting any certain estimation; thus, then, no loss beyond the half can be rightly conceived: and that is at all events necessary, that there may be room for a rescission on account of enormous loss: *l. si voluntate 8, in fine Cod. de rescinden. vendit.* (C. 18. 5.) Lastly, as neither an "oath" nor a "sentence" is rescinded on account of lesion only, neither is it admitted in a compromise, whose force is not less than, but is equal to, an "oath" and a "judgment." *l. non erit 5, § dato 2, ff. de iurejurando* (D. 12. 2.) § 11. *Instit. de action.* (I. 4. 6.) *l. res judicatæ 2 Cod. de re judicat.* (C. 7. 52.) joined to *l. 2. ff. de iurejur.* (D. 12. 2.) *l. non minorem 20 C. h. t.* (C. 2. 4.) *l. 1 C. de conduct. indeb.* (C. 4. 5.) *Peregrinus de fideicommissis. art. 52. num. 102. Radelantius Curie Ultrajectinæ decis. 102. num. 13, 14. Andr. Gayl. libr. 2. observ. 70. Tyraquellus de retract. gentil. § 24. gloss. unic. num. 4. Ant. Faber, Cod. libr. 2. tit. 21. defin. 4. Ant. Matthæus de obligat. disp. 6. thes. 19. Stockmans, Curie Brabantinæ decis. 137. Vinnius, illustr. quest. libr. 1. cap. 57 et de transact. cap. 8. num. 11, 12, 13.* It is in vain that the opposite opinion is laboured for. *Fachinæus, libr. 2. contr. cap. 26. Carpzovius de fin. Forens. part 2. constit. 34. def. 4. Berlichius, part 2. conclus. 42. num. 3 et seqq.* and others there cited. For no defence for their opinion is to be found in *l. si superstite 5 C. de dolo* (C. 2. 21.), which does not treat of "enormous loss," but of loss arising out of the fraud of a father; the title under which the said *l. 5* is contained makes this probable, and the words of the law manifestly show this as they deny the action of fraud, not on account of the absence of fraud, but rather on account of the feeling of respect due to a father; which respect, even where fraud was most manifest, would not allow the defamatory action of fraud to be brought by a daughter against her parent, but, instead thereof, a verbally-moderated action *in factum* (i.e. accommodated to the particular facts of the case, *d. l. 5. junct. l. non debet 11, § 1, ff. de dolo* (D. 4. 3.)) Nor does it help that the lesion itself includes fraud, *l. si quis mancipiis 17, § proculus 4, ff. de instit. act.* (D. 14. 3.), for this reason, that that fraud does not flow "from design" (*ex proposito*), but only "from the fact" (*ex re*), as they commonly say: nor is the comparison made in *l. si quis cum aliter 36, ff. de verbor. obligat.* (D. 45. 1.) in respect of all things done, nor as to things of every kind, but only in certain kinds of fraud and lesion by design. Certainly not as to those in which an agreement was interposed as to an uncertain or doubtful matter, and it

afterwards appears that at the time of agreement, not even the half was due, which by virtue of that subsequent agreement was to be given. For it is not to be supposed that any one acted fraudulently if he sue on an agreement which was *bonâ fide* entered into from the beginning as to an uncertain matter: this is manifest from the "oath" offered to the plaintiff by the defendant, for if the plaintiff takes the oath proffered to him by the defendant, he proceeds (*agit*) rightly as to that which he swore was owing, although afterwards he who had offered the oath to the plaintiff can prove that nothing was really due; for there can be no question of perjury, when he who swears is without fraud at the time of the oath offered and taken, § *item si quis* 11 *Inst. de action.* (I. 4. 6.) He who swears, claims, not because it was formerly due, but because it began to be due by the agreement which is contained in the proffer of the oath; since the defendant offering it to the plaintiff is understood to have promised that he will pay, if the plaintiff will swear that what is sued for is owed: and therefore he ought only to impute it to himself that he wished to be bound by such an obligation: as is laid down *tit. de jurejurando*, num. 25 (*tit. 12. 2.*), and the same thing which obtains in respect of an "oath" must also be taken in respect of a compromise, for these two are equal in effect: *l. 2. l. admonendi* 31, *ff. de jurejurando* (D. 12. 2.) For he who sues on a compromise does not sue because something was due before, but because the adversary promised that he would give, provided the other desisted from the further lawsuit, and therefore it is not even to be inquired from *what* lawsuit the plaintiff desisted, whether a just or an unjust one, but only this is to be asked, whether the condition of the obligation has been performed, or whether he desisted from the suit who, under condition of desisting from the suit, had *bonâ fide* founded a right of obligation. For the whole "cause" of "giving" and "promising," in the compromise, is the suit and the abstaining from such suit, or, as Paulus says, "the very receding from the suit," seems to be the "cause" of the "giving" or the promising: *l. in summa* 65, § *et quidem* 1, *ff. de condict. indebiti* (D. 12. 15.) If a compromise has been interposed, and either party is unwilling to keep it, then if it have been entered into by nude pact, only an exception could compete by the Roman law, but BY OUR LAW, according to the principles laid down in the preceding title (Bk. 2. 15), an action would not be denied any more than it would be denied where, by the principles of the civil law, it had been strengthened by a "stipulation," a "giving" (*datio*), and thus by an innominate contract; in which case it is known that an action is given on the stipulation and on certain prescribed words: *l. cum nota* 6, *cum præponas* 17, *sive apud* 28, *l. si pro fundo*, 33 *C. h. t.* (2. 4.) And if it were strengthened by oath, he would, in various ways, be held thereto, who, being a major, was unwilling to stand by the compromise sworn to: *l. si quis major* 41. *C. h. t.* If a penalty have been added, the adversary can exact the penalty from the refractory party delaying to fulfil the conditions of the transaction, or he can

recover what was given in the name of the compromise, and thus can proceed on a wholly new cause, just as if there were no agreement made. *l. si diversa* 14. *l. promissis* 37. *l. 40 D. h. t.* (C. 2. 4). If the compromise be entered into both by the religious obligation of an oath, and at the same time by a penal stipulation, he rightly seeks both the penalty and at the same time the fulfilment of the compromise, on pain of perjury. *l. si quis major* 41. *C. h. t.* (2. 4.): this also obtains if a penal stipulation has been so added to a compromise not sworn to, as this "if any one go against what was promised, the pact remaining valid, the penalty will be awarded:" *l. pen. ff. h. t.* Confer *Vinnius de transaction. cap. 2.* For the fulfilment of the compromise, you can proceed during the whole of thirty years, from the time when the compromise was interposed: since, on general principles of law, actions thence arising, like personal actions, do not extinguish, unless by a prescription of thirty years: *l. sicut* 3 *Cod. de præscript. 30. vel 40 annorum* (C. 7. 39). *Respons. Ictor. Holl. part 2. consil. 266.* As, however, an election once made seems to prejudice one, so when an action for fulfilment has been begun, there is no power of recovering the penalty or of resiling from the transaction; and *vice versa*: *l. ubi pactum* 40 *in verbis*, before the cognition of the cause *C. h. t.* (2. 4.) *arg. l. post diem 7 ff. de lege commissaria*: *Marta, digest. jur. noviss. tom. 3, tit. transactio, cap. 32.*



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JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEIDEN.

HIS COMMENTARY ON THE PANDECTS:

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PRINCIPLES OF EQUITY.

PART VII.,

OF THE

Vol. I. Bk. III. (Title I. to III. inclusive, pp. 189-217)

On Pleading for

On Infamy.

On Attorneys and Defendants

TRANSLATED BY

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IN THE HIGH COURT, BATHURST, AUSTRALIA.

DEPT. AIMS: 1 0 TOTAL



JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

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WHEREIN, BESIDES THE PRINCIPLES AND THE MORE CELEBRATED
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JAMES BUCHANAN,

ONE OF THE JUDGES OF THE SUPREME COURT, CAPE COLONY, AND JUDGE PRESIDENT
OF THE HIGH COURT, ORIOQUALAND (KIMBERLEY).

CAPE TOWN: J. C. JUTA.

1883.



LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BOOK III. TIT. I.

ON PLEADING FOR.

SUMMARY.

1. One pleads for oneself or for another. In the older Courts of Holland, even, one could appear for oneself. The office of ADVOCATE is a praiseworthy, noble office, and "gowned warfare" as honourable as warfare in the field. Voet cites passages in proof, and shows that advocacy is not derogatory to the nobility, as some have wrongly thought.
2. All non-prohibited persons can plead. Prohibited were: *a*, minors under seventeen; *b*, infamous persons; *c*, women; *d*, the blind; *e*, patron pacters for a share of suits. *f*, Prohibition in one place or Court does not operate in another, unless disgrace follows everywhere. NOWADAYS religious differences no bar, but priests not admitted unless renounce sacred office. Prohibited parties cannot plead, even if no objection taken by opponent. If the Judge, however, does not prohibit, what follows on their pleading is valid. Even prohibited persons can plead when filling some necessary office, *e.g.* tutors or curators.

This section details certain restrictions on advocacy now abolished; except—

3. That Judges cannot advocate the causes on which they are to adjudicate.
4. It is a moot point whether, after becoming acquainted with your client's case and finding it dishonourable, and you abandon it, you can espouse the other side. Voet, while freely conceding the liberty and necessity of a free change of view, when reason leads us to it, thinks an advocate should not espouse the other side, especially if other clever advocates are numerous. If a magistrate imposes the duty it is different; or if some office, *e.g.* tutor, bring the necessity.
5. Pleading against the edict is punished by a fine.
6. In olden times legal assistance was unremunerated. Then the Roman law allowed it, according to circumstances and up to a certain maximum (equalling say £88 10s. in Roman coin). NOWADAYS it varies according to local Court custom, and under taxation. Is due and recoverable even though not promised. Neither advocate, nor attorneys, nor those similarly situated can, however, retain the suit-documents for fees, except for expenses incurred on such documents. Nor have they a right of preference over other creditors; they are not hired servants. They cannot recover after two years from the ending of the suit, unless they have the client's own written acknowledgment or a confession. BUT VOET ADDS THAT this biennial prescription is hardly observed in practice, although founded on the express edict of Charles V.

and fortified in his time by a recent decision of the Ultrajectine Courts, cited by Wesel.

7. Not only can you recover fees when acting for others only, but also when you act for yourself jointly with others; you can then recover proportionately from your partners. For neither equity nor reason require you to neglect your own affairs for others, your partners, or relatives. VOET HAS NO DOUBT that a victorious advocate, advocating his own suit, can recover his own fees among his costs; and that an advocate's fees can be recovered from the defeated party, even though such advocate had in the first instance acted as a friend or relative, and intended to charge nothing. But Voet adds that many disagree with him, and think that an advocate cannot recover for his own work; among others Gail thinks so.
8. When an annual fee is fixed and the advocate die in the middle of the year, his heirs recover the whole amount, or retain it if paid. Voet says this is modern law too, though the Belgic and Gallic commentators differ, holding there should be an apportionment. Hence a known practice in many cases only to pay for the quarter during which the death took place.
9. Advocates appear in civil and commercial cases, first taking the "oath of calumny," i.e. not to act unjustly or dishonourably in any respect.
10. If advocates lose or betray cases by manifest fraud and malice, they are liable to an action or can be extraordinarily punished for collusion. But SCARCELY, says Voet, for unskilfulness or error of law or fact. Even Judges are not NOWADAYS liable for unskilfulness. The client must correct within three days if present, and not acquiesce in judgment, if absent. But NOWADAYS there is no limit of three days; the client can correct at any time before contestation of suit; after it he must be restituted in integrum, unless the correction be on the same day, &c.
11. Advocates are assigned by the Court to those who for good reason cannot procure them. Such advocates are bound to take up the case or be barred for pleading, except they show cause. NOWADAYS such assignment is only for poverty; and the juniors are so assigned, the Judge taking care the cause is not prejudiced. Only two counsel can plead on same side, but more may advise. Where number on roll is small one party cannot exhaust it all on his own side.
12. An advocate can neither withdraw from a just cause nor Court practice. It is forbidden to agree for payment on victory only, for though this cannot be said to be a covenant for the share of suit, it is equally lowering to an advocate's dignity.

1. THEY are said to "plead for" (*postulare*) who set forth their own strong wish (*desiderium*), or the strong wish of their friends, or who contradict the strong wish of a third person, before him who presides with jurisdiction: l. 1, § *postulare*, 2, ff. h. t. (3. 1), even sometimes before petty judges (*judices pedarei*), but improperly: l. 1, § *removet*, 6, ff. h. t. A person thus pleads either for himself or for another. Just as the Roman law permitted one to plead for oneself, so also it is clear it was heretofore allowed to individuals to do so in the Court of Holland—see the great privilege conceded to Mary of Burgundy by the Hollanders, 14 March, 1476: *Placaat Bk. vol. 2, p. 661 in med.* Those who plead for others are called "advocates," patrons of causes or orators, and are said "to stand by" (*adesse*) the litigants, just as the magistrates "preside" (*præ-esse*) in declaring right, as remarked by *Brissionius, Antiquit. lib. 1, cap. 20.* They engage

in a laudable and necessary duty of life, and ought to be rewarded with distinguished rewards and privileges on that account. *Vide l. laudabile, 4, et tot. tit. Cod. de advocat. divers. judicum (C. 2. 8.), et tot. tit. C. de advocat. divers. judiciorum (C. id.).* These are they, according to the Constitution of the Emperors Leo and Anthemius, who, while they remove the ambiguous fates of "causes," and by the power of their defence often establish what has "lapsed" in public and private things, refresh the wearied, and do not the less serve the human race than if they saved their country and their parents by wars and wounds. For (say the Emperors) we do not consider that they only fight for our Empire who strive with sword and shield and breastplate, but so do also the advocates, for they battle the causes of their patrons, trusting to the protection of a glorious voice; they defend the hope, the life, the descendants of those who are struggling: *l. advocate 14. C. de advocat. divers. judiciorum (C. 2. 8.).* Let there therefore vanish that more imprudent opinion of some who think that the honourable duty of advocacy works prejudice to the nobility won by the bravery of our forefathers, and that it is not with due honour that we display in our entrance-halls the smoke-worn images of our ancestors and the Æmiliani standing on the chariots, while near by stands a large crowd interrogating us as with client-right, as if it be a dishonour imitating the examples of our fathers and our forefathers, not only by the arts of war, but by advocacy, to advance to that height of renown whence very often our ancestors transmitted to their descendants the splendour of illustrious forefathers. Or as if it were to be avoided as a vice that one should wish to distinguish himself by his own merits; and not merely the merits of another. It certainly seemed otherwise to the olden Romans; and otherwise also does the study so very greatly expended on this art by the most eminent men point us, adorned by the praises of the Roman writers; otherwise also tends that even till nowadays, and oft-repeated, rebuke of Quintus Mucius to Servius, viz. that "it was disgraceful to a patrician, a nobleman, and an orator of causes, not to know the law in which he practised:" *c. 2, § Servius; 43, ff. de orig. juris (1. 2.).* And if no one deny that praiseworthy is the work of them who diligently labour to increase the richest stores gathered by their ancestors and transmitted to them, as greatly will he err who thinks it indecorous to add his own contribution to the glory won by our ancestors by excelling in deeds of "gowned warfare." *Vide Tyroquellas de nobilitate, cap. 27; Zypeus notit. juris. Belg. libr. 1. tit. de postulande versa unde, &c., and my oration, as to the duty of an advocate, which I delivered at — as an inaugural address.*

2. All could plead who were not prohibited. Slaves were wholly prohibited, and minors below seventeen years of age; but one who had attained that number of complete years the prætor allowed "to proceed" in public, as of tempered years; thus at that age, or a little older, Nerva is said as a boy to have "responded publicly:" *l. 1,*

§ *initium* 3 ff. h. t. (D. 8. 1.). Those who were disgraced (*infames*) were especially interdicted from pleading for others; women also, on account of the modesty of their sex; the case of Carfunia gave rise to this prohibition, or, according to Valerius Maximus, the case of Afrania, a woman who pleaded most dishonourably and immodestly. The blind also were forbidden, being unable to see and respect the magisterial emblems of office: l. 1, § *secundo loco*, 5 ff. h. t., such as the bundles of sticks, carried as symbols of the punishment of evil-doers (*fascēs*), the axes therein inserted (*securēs*), the magisterial chair (*sella*), the gown with purple border worn by magistrates (*toga prætexta*), as Brinonius fully treats of in his *Antiquities*, lib. 3, cap. 14. 15. Those also were prohibited who, when they were patrons of causes, pacted with their clients for a share of the lawsuit, or those to whom, for other causes, advocacy in courts was forbidden: l. 1, l. *si quis*, 5; C. h. t.; l. 6: § 1, l. *imperator*, 8, l. q. ff. h. t.; l. 1, § *pen. ff. de offic. præfecti urbi* (D. 1. 12.). If, however, there is a prohibition to practise in one place, by the decree of one presiding magistrate, it does not prevent pleading in another place, or before another judge, provided there do not accompany the prohibition following such a brand of infamy that it even follows one practising elsewhere, according to what is laid down in the following title (3. 2.): l. *ex ea causa*, 9, ff. h. t. arg.; l. *relegatorum* 7, § *interdecere* 10, ff. *de interdictis et relegatis* (D. 48. 22.). The Christian emperors deprived heretics, Jews, pagans, and all others not imbued with the mysteries of a pure Christian religion from the right of pleading: l. *ult. C. h. t.* (C. 2. 6.). And although it is perfectly clear that NOWADAYS such dissent among Christians in the fundamental or other heads of belief does not exclude any one from Court practice, nor take away the right to give clients protection, yet if any one has elsewhere obtained liberty of thus legally "responding," or has been clothed with the highest juridical honours, and becomes by oath a defender of the pontifical priesthood, he is not to be admitted to practice unless he have renounced that office and been freed from it: *Placaat of Holland*, 12 March, 1591 and 1595, vol. 1, *Placaat Boek*, p. 223. By virtue of that decree I remember that when a certain person made application to a Court of Holland to be admitted, he was refused admission, but having obtained honours in an Ultrajectine university he was admitted; he still remains a living member of that university, and witness to this. All those mentioned are to be repelled, even if their opponents have not objected to their advocacy, but it were open to them to plead, *quos prohibet*, 7, ff. h. t., for they are not excluded out of favour to the adversary, but more on account of the reverence due to the judge and on account of their own indignity, lest the authority of the prætor should be shaken by the foolish altercations of sordid men. But if neither the adversary have opposed their right, nor the judge have removed those prohibited from pleading, what is acquired by their advocacy is not void: *filius familias*, 8, § *veterani*, 2, ff. *de procurat.* (D. 3. 3.); l. *ita demum*, 13,

C. de procurat. (C. 2. 13.). As those, however, who are even otherwise prohibited rightly proceed to plead when they fill some necessary office, without thereby offending the prætorian interdict, *l. puto autem* 6. *ff. h. t.*, for that reason especially has it seemed fair and equitable that even infamous persons should be heard, when they fill the office of tutors or curators, when they plead for those for whom they are thus tutors or curators: *l. 1, § remonet, 6 prope fin. ff. h. t.*

3. This section details certain restrictions on advocacy now obsolete; except that Judges cannot advocate the causes on which they are to adjudicate: *l. quisquis* 6. *C. h. t.*; *Introduct. Cur. Holland. art. 231*; *Curie Supremæ, art. 13, etc.*

4. But whether he who first gave his services to one side, and has learnt to know his case and arguments, but abandons it because it is not supported by justice, can espouse the opposite cause, as being the more just, is a point of doubt. Those who think it permissible say that it is the duty of a wise man to remould his advice so as to become better: that it is a mark of candour to change his own view for the Papinian's, and to be led to the opposite opinion by the stronger balances of reason, according to *l. si venditor* 6, § 1. *ff. de serv. exportandis* (D. 18. 7.), that often many points are dissimulated and feigned, that proceedings are instituted by those who come first into the cause, composed of false allegations, and that when the falsehood of them is detected, a lover of justice cannot leave the adversary. That thus even a prætor often revokes that which by his first interlocutory decree he had ordered or forbidden, and cancels by a contrary final sentence, *l. quod jussit* 14. *ff. de re judicata*, and that it has been laid down that a tutor is not prohibited from standing by his ward in a matter in which, as an advocate, he had been against his (the ward's) father: *l. ult. ff. h. t.* But though it be true, AS I FREELY CONCEDE, that it is the part of a prudent man to approve of the better course when he sees it, and to reject the worse, and that the necessity to do this imposes on a patron of causes solemn oath of calumny, which bids him as soon as possible abandon a suit which, as the contest proceeds, he finds out to be a dishonest one, and destitute of right and truth: *l. rem non novam* 14, § *patroni*. 1 *C. de judiciis* (C. 3. 1.), yet I do not think it sufficiently consistent with the honour and propriety of an advocate, nor to put him indeed beyond the stain of being led by sordid gain, that in a, as it were, betraying manner he should render assistance to the adversary, and turn, perchance, the revealed secrets of his former client into that client's very destruction and oppression. Especially if there be an abundance of other very clever men, and there be no fear that truth or justice will be prejudiced by the neglected defence of a juster cause. Clearly, if by the interposed authority of a magistrate any one be ordered to espouse the cause of his adversary, it is beyond doubt that you will rightly extend the argument from the case of a prætor, fulfilling that necessary duty, to the case of an advocate changing

sides. And so will it likewise be if any one become thus bound, not willingly, but in a tutorial or curatorial capacity, for promoting the advantage of a minor, according to *d. l. ult. ff. h. t.* Vide *Zoësius ad Pand. h. t. num. 15*; *Struvius ad Pand. h. t. num. 10*.

5. Whoever pleads "against the provisions of the edict" is punished extraordinarily by a pecuniary fine: *l. 1, § removet 6. in fine, ff. h. t. Adde. placitum Ordin. Holland. 1 Auguste 1603*; *Instruct. Cur. Holland. art. 231*; *Instruct. Cur. Supremæ, art. 11. 12. 13*.

6. No remuneration (*solarium*) was of old allowed to "orators of causes" for their legal assistance (*patrocinium*) rendered, but it gradually became the practice, according to the Roman law, that aid given to a client was remunerated with a "honorarium," according to the importance of the suit and the advocate's eloquence, and the custom of the Court in which the proceeding was; on condition, however, that in no suit should the "honorarium" (the honorary fee) and the "palmarium" (reward for victory) together exceed the amount of a hundred *aurei* [an aureus equalled 25 denarii, and a denarius about 8½d. Eng.: 25 denarii thus equalling 17s. 8½d., 100 aurei equalled say £88 10s.; and then allow for the time.—TRANSL.]: *l. 1, § in honorariis, 10*; *et si cui 12*; *ff. de extraordin. cognit. (D. 50. 13.)*; *Tacitus, Annal. libr. 11, cap. 7, in fine*. But now it is more fixed according to the labour expended, according to the prescribed and established custom of each Court; the amount to be diminished, if necessary, by the taxation of the judges. Nor does it matter whether the reward has been promised or not, since the recovery of what has even not been promised is allowed to advocates, by means of an extraordinary proceeding: *l. Divus 4. ff. de extraord. cogn. (D. 50. 13.)*. But they could not, by the retention of the suit documents, protect themselves for the recovery of the fees, neither whether they were advocates nor attorneys nor others similar to them, and to whom the like reasons were in this respect applicable: *Instructu Curia Holland. art. 80*; *Curia Supremæ, art. 166*; *Ultrasectina, tit. 4, cas advocaten, art. 11*; *Brabantina, art. 22*; *Flandricæ, art. 167*. But if they wish to retain for "expenses made," that retention is not to be denied, according to the common law: *arg. l. quæ omnia 25 in fine, et l. 26 ff. de procuratorib. (D. 3. 3)*. *Andr. Gayl, libr. 2, observat. 12, num. 5*; *Groenewegen ad d. l. 25 et 26 ff. h. t. (3. 1.)*, *et ad l. ult. C. commodati (4. 23)*. Nor can they arrogate to themselves any right of preference on the goods of the debtor over his other creditors, on account of such fees, for no such privilege is anywhere found given to them by law; nor can they be put on the footing of hired servants: *vide Carpzovius, defin. forens. part 1, tit. 28, defin. 30*; *Hartmann. Pistor. part 1, quæst. 8, num. ult.*; *Berlichius, part 1, conclus. practicab. 64, num. 76*. Nor can they recover after two years (it is one year in the *Instructions of the Court of Holland, art. 82*) from the ending or interruption of the suit in which they acted as advocate or attorney, unless they are armed with the client's own handwritten acknowledgment (*chirograph*), or by a confession of the debt in any other way. Still this

prescription of two years is hardly observed in practice as regards the recovery of fees, although it is clearly laid down by the perpetual edict of Charles V. and the instructions of the Courts: *Edict. perpetuum Car. V.*, 4 Oct. 1540, art. 16; *Instruct. Cur. Sup.* art. 165; *Cur. Ultraject.* tit. 4, *van advocaten*, art. 10; *Cur. Brabant.* art. 27, and was repeated in a recent decision of the Ultrajectine Courts in 1659, 14 April, art. 21. *Vide Abrah. a Wesel, comment. ad. novellas Constitutiones Ultraject. d. art. 21. num. 14, et multis seqq.*

7. But not only is the right of recovering fees competent when one has simply (*plane*) acted as the patron of others' suits, but also if one has expended labour and industry in a matter common to himself and to others, he will recover proportionately from other co-heirs and partners that which they would have had to pay if he had given his aid, not as a co-heir or consort, but as a stranger. For neither does equity nor does any reason demand that any one should gratuitously lend his aid to the lawsuits of others (and those suits which are common to ourselves and others are partly the suits of others), *arg. l. § quære 12; ff. quando appell. et intra quæ tempora; l. servi electione 5, § 1. 2. ff. de legates l. (D. 30. 1)*, when he is in the interim prevented from attending to his own affairs: *Boerius, decis. 210, num. 4; Mynsingerus, cent. 1, observat. 2, num. ult.; Munnos de Escobar de ratiocin administrat. cap. 27, num. 52; Johan Papon. libr. 18, tit. 2, assert. 15, in fine.* Nay, indeed, if an advocate have clearly himself conducted his own suit, and his opponent had in the end been condemned to pay him the costs of suit, I DO NOT AT ALL DOUBT that such advocate would reckon in his costs the fees due to himself for his work done in his own suit, just as much as if he had lent his aid to a stranger; not only because, while he was busy with his own suit, he had to neglect and refuse other suits, thus missing the rewards thence obtained, for which the commentators allow a recovery of the damage done and of "that it which profiteth him"; but most of all lest there should otherwise in great part cause the penalty for "calumny" to be imposed on those litigating rashly. And certainly if it seem just that the losing party can be summoned by the victorious, when condemned in costs, to pay the fees due to the victor's advocate, even although he had wished to lend his aid gratuitously to the victor on account of the ties of friendship or of blood, and the victor had on that account really paid out nothing: *Papon. d. libr. 18, tit. 2, assert. 14; Costalius, ad l. 79 ff. de judiciis (5. 1.)*. I do not understand why in the present case also the victorious advocate should not likewise recover the reward of his work, although many rather incline the other way, and think that an advocate should not easily recover the fees for work done in his own case. *Andr. Gayl, lib. 1, observ. 151, num. 16 et seqq. Mynsingerus, cent. 1, observ. 2; Papon. d. libr. 18, tit. 2, assert. 15 in pr.*

8. If an annual remuneration (*retainer*) has been fixed for an advocate, and he die before the end of the year, not only do his heirs retain the whole fee already paid, since it was not his fault that he could not

render the service, 1, § *Divus Severus*, 13, ff. *de extraord. cogn.* (50. 13); *l. qui operas*, 38, pr. et 1, ff. *locati* (19. 2); but they can also recover it if yet unpaid: for since it has so been laid down in respect of the *fisc*-advocate, much more ought it so to obtain in the case of those who gave their services for a year to private parties; lest otherwise the *fisc*, to whom many prerogatives are given, should be in a worse (?) condition than private parties not clothed with the advantages of any particular rights. That this should be laid down as our law NOWADAYS you will deservedly think. The Roman law rule is approved by *Mynsingerus*, cent. 3, observ. 8; *Andr. Gayl*, lib. 1, observ. 44, num. 12, 13; *Berlich. concl. practic. part 1, conclus. 9*, num. 78, et seqq., and other authors there cited. On the other hand, the Belgic and Gallic commentators argue that the honorarium is due to the heirs for no longer than that proportionate time which the advocate lived; because both the giving of the labour and the money can be apportioned: arg. *l. Sejo*, 10, ff. *de annuis legatis* (D. 33. 1); *Christineus*, vol. 5, decis. 118, num. 14, et seqq.; *Zypæus*, notit. Jur. Belgici, libr. 12, de dignitatibus veos. honorarium, and other authorities cited by *Groenewegen*, ad d. l. 15, C. de advoc. devers. judicior. (2. 7). And thus it is that, with respect to the privileged fees of very many professors and public speakers, the payment is only made for that quarter in which they died, according to the very well known practice.

9. Advocates may appear in all cases, civil or criminal, first taking the "oath of calumny"; for although this was taken, in individual cases, among the Romans, according to the form given in *l. rem. non novam* 14, § *patroni* 1, C. de judiciis (3. 1.); § *ecce enim* 1; *Instit. de pœnâ temere litigentium*; yet BY OUR LAW it is generally taken at the beginning of practice (*militiæ togatæ*), to be renewed afterwards in particular years at a stated period, according to forms which you may see in the *Instructions of the Court of Holland*, art. 71; of the *Ultrajectine Court*, tit. 4, of advocates, art. 1; of the *Brabantine Court*, art. 287. 288; of the *Court of Flanders*, art. 155. By this oath they guarantee not to undertake the defence of an unjust cause, nor to proceed with a cause begun where its injustice appears; nor to make use of falsehood and calumny in a just cause, nor railing language beyond what the advantage of the case demands; nor to rage furiously (*debaçchentur*), openly or craftily, to the contumely of the adversary; nor work for low gains, nor protract the suit intentionally for low profit and dishonourable reward; but take every opportunity and court every occasion to increase what is truly praiseworthy in practice: *l. quisquis* 6, § 1. 4. 5. C. h. t. (2. 6); see the *Instructions of the Supreme Court*, art. 130; of the *Court of Holland*, art. 72. 74; of the *Ultrajectine Court*, tit. 4, on advocates, art. 3. 5. 6; of the *Court of Brabant*, art. 293; of *Flanders*, art. 156; and my speech "on the office of an advocate."

10. If advocates lose or betray their clients' cases by manifest fraud or malice, without doubt they can be summoned by the action of fraud for "that which it profiteth:" *l. consilii* 47, ff. *de regal. juris*. (D. 50. 17);

and even be extraordinarily punished for collusion (*prævaricatione*): l. 1. § 1, l. *prævaricationis*; § 8 *quod vi ff. de prævaricat.* (D. 47. 15); my father P. Voet, *ad princ. Instit. de oblig. ex quasi delictis*, num. 3. *in fine*. But if by unskilfulness only, or error, whether of law or fact, they advise or act so that damage occurs to their clients, we can SCARCELY lay down that they are on that account bound to us, for no obligation arises from advice which is not fraudulent, d. l. 47, ff. *de reg. juris* (D. 50. 17), for not even are judges NOWADAYS liable to those whom they injure by bad decisions through unskilfulness, as will be elsewhere stated. The error even of the advocate does not injure his client where, being present, the client does not correct it within three days; or, if he were away, he acquiesces after the sentence: l. ult. C. *de errore advocator* (C. 2. 10). Although by OUR LAW this power of revoking an error is not restricted to three days, since there can sometimes be a correction of error even before the contestation of suit; but after contestation of suit restitution in integrum is needed, unless on the same day, and during the same sitting, "*stante rota*," as they say, the correction he made. Groenewegen, *ad l. 2. § ult. C. de error. advoc.* (C. 2. 10).

11. If any one be without a patron, on account of the power of his adversary, or of any other cause, one will be assigned to him from among the roll of advocates by the prætor or the presiding judge, which advocate will be, even unwillingly, bound to take up the case; for that is a public duty—so much so that any one refusing to fulfil this demand of the prætor will thereafter be barred from pleading, unless he had a good cause for refusal: l. *nec quicquam*, 9, § *advocatos* 5, ff. *de offic. procons. et legat.* (D. 1. 16); l. 1. § *ait prætor* 4, ff. *h. t.* (3. 1); l. *providendum* 7, C. *h. t.* (2. 6). But NOWADAYS this scarcely occurs otherwise than where aid has to be rendered to any one gratuitously, on account of poverty. In which case this duty is usually imposed on the juniors, or on any practitioners promiscuously, at the discretion of the judge, according to the varying custom of each place. See *Instructions of the Court of Holland*, art. 25. 78; of *Brabant*, art. 292; of *Flanders*, art. 25. 78; of *Ultraject*, tit. 4, of *advocates*, art. 16. But it should be guarded against that those whom merit or age have made most renowned in our Courts do not all stand on one side, and that the other side should be supported by those who are inexperienced and tyros; therefore he who presides is ordered to make an equal distribution, and to apportion to parties the help of individual practitioners, lest the client sustain defeat more by reason of the unskilfulness of the juniors than by the injustice of his cause; d. l. 7, C. *h. t.* But it is hardly the case NOWADAYS that an equal number of advocates on both sides should be drawn up in array by the public authority of the judges; since every one takes at his own discretion as many as he needs from a sufficiently large number of practitioners: for although the Court of Holland has decreed that not more than two advocates should appear to plead for the plaintiff, and as many for the defendant, in the public Courts, yet it is never forbidden to take

the advice of more : *Simon van Leeuwen, censur. forens. part 2, lib. 1, cap. 7, num. 23*. Although, on account of the smaller number of practitioners in the Court of Flanders, at Middelburg, it has been provided that no one should take counsel from more than two advocates of that Court, lest otherwise the opportunity of obtaining legal aid be taken away from an opponent : *Instruct. Curis Flandricis, art. 166*.

12. Just as it is not the duty of a good practitioner to withdraw from causes resting on justice, so on the other hand he must abstain from a sordid desire and ambition to gain practice ; and for this reason it is not allowed to him to undertake the conduct of causes on condition that he should not be paid except on victory, for although in such an agreement a pact for a share of the lawsuit is not included, yet "the elders" (*Majores*) have considered such an agreement alien to the dignity of the office of advocate. *Instruct. Curis Holl. art. 81 ; and tit. de pactis, num. 18, (ante, p. 350)*.

TITLE II.

OF THOSE STAMPED WITH INFAMY.

THE Roman system of Infamy and its consequences being now almost obsolete, and it being the object of this Translation, as previously explained, only to preserve practical parts of present application, the first 8 sections of this Title are not now translated, for the reasons given in the next paragraph.

* * * * *

9. I have thought it sufficient (continues Voet) to treat very slightly of this matter of infamy, because I have found its application NOWADAYS to be not very much : for neither are those who are now condemned by the Court on account of fraud in guardianship, mandate, deposit, or partnership "infamous" : *Groenewegen, ad § 2 Instit. de pœnd, temere litig.* ; my father, *P. Voet, ad. d. § 2 num. 2* ; *Simon van Leeuwen, cens. for. part 2, libr. 1, cap. 4, num. 9*. Nor does any civil trial, whether on contract or delict, for indemnity or a pecuniary fine, make infamous, unless it were nominately expressed in the statute, as in respect of those defrauding the revenue, or unless, on account of the gravity of the circumstances, the judge by his sentence thought that infamy should be nominately imposed : thus one who is condemned by an action of "injury" to make an apology, preserves his good name and reputation in case of doubt. *Argentæus ad consult. Britt. art. 159, gloss. 1, in med.* ; *Zypæus notit. jur. Belgici, lib. 1. tit. ex quib. causis infamia irrogatur* ; *Groenewegen, ad l. ult. C. qui et advers. quos in integr. restitui non posse* ; *Leeuwen, censura forens. d. part 2, libr. 1, cap. 4, num. ult., et part 2, libr. 2, cap. 15, num. 10, in med.* Nor is he infamous who marries a woman within the "year of mourning," as will be more fully said in *tit. de ritu. nupt. (D. 23. 2)*. And, generally speaking, infamy is NOWADAYS not the consequence of every crime, but according to its class, as whipping or any other kind of corporal punishment, banishment to gaol, to the convict-ships, house of correction for slaves, the mines, and the like : *Groenewegen, ad l. 22 ff. h. t.* ; *Leeuwen d. part 2, libr. 1, cap. 4, num. 9, et libr. 2, cap. 15, num. 10, 11*. As these punishments cannot be imposed upon the attorney of the offender, but on the defender himself, in cases where custom allows an attorney to appear in criminal

cases, the consequence is that NOWADAYS those who appear by attorney do not avoid infamy any more than those do who themselves appear in Court : *Zypæus, notit. jur. Belgici, libr. 1, tit. ex quibus caus. infam. irrogatur ; Ant. Matthæus, de crim. libr. 48, tit. 18, cap. 3, num. 9.* Mere detention in gaol, whether for a crime or on account of a civil debt, or to force a defendant to do an act, does not involve infamy, since it is not then regarded in the place of a punishment, not being for the purpose of punishing, but rather of restraining persons : *l. aut damnum, § 8, solent. 9, ff. de pœnis.*

TITLE III.

CONCERNING ATTORNEYS AND DEFENDERS.

SUMMARY.

1. Attorneys were hardly of use, of old, for every one could appear in Court for himself. But NOWADAYS it is different. Their office is a public one; and in many respects they resemble advocates, though the dignity is less. They must take an oath of office, and can recover fees. What was laid down in the last title is also of application here.
2. Every one can appoint an attorney, except minors; they require tutors' authority; but what an attorney not properly appointed gains for minors yet benefits them. Tutors, curators, attorneys, and the like, can appoint attorneys NOWADAYS before contestation of suit. Attorneys appointed to carry on a suit can do the like, even where their mandate has no power of substitution, though it is safer the mandate should contain the power of substitution.
3. Whether an attorney, appointed to conduct business, can appoint an attorney to a suit, depends on the terms of his mandate. If his mandate is limited, so is his right of substitution: if wide, he can bring action, assert, &c., in principal's name, and can substitute freely.
4. Prohibited persons cannot be attorneys: e.g. accused persons under trial; soldiers, during term of service, except for military purposes; infamous persons women. But women may act *in rem suam*, or for her parents, sick, old, or defenceless; not, however, for her children, for them she must pray a tutor; nor for her parents in ordinary cases. No woman can (it is OF THE CLEAREST PRACTICE) be entered on the Court roll of attorneys. Yet she can, as clearly, hold a general power, with free administration, carry on suits, recover money, &c., provided only she appoint a Court attorney to do Court work. A wife can thus clearly sue as the agent of her husband.
5. Whether NOWADAYS a married woman can without the consent of her husband be appointed by a third person as attorney to carry on a suit is a MOOT POINT. If you view her as a minor, still minors over 17 can act *for others*, without being open to the procuratorial exception. Vowr dissents from Rodenburg, and argues out the point with him.
6. Minors over 17, full, can be attorneys. You need not fear a "restitution" in their case: for the sentence is executed against the principal's goods and not the minor's. The minor's attorney could not therefore claim relief as against the sentence, but might as against his expended costs. Defenders without mandate, however, require to be majors, as all they do is at their own risk, and they are liable to personal execution.
7. Attorneys are "general" or "special," whether they are judicial or extra-judicial. The former are for all things, the latter for special things. A general

attorney is either appointed with "free administration" or "simply." With free administration he can do almost all his principal can do : e.g. alienate goods, and transfer, in case of advantage to principal, and not only of necessity. He is sometimes thus said to have a "full mandate." But donate he cannot : that is "to lose," and not "to administer." One with a "simple" mandate cannot alienate anything without a special power, except perishables. Voet argues against the view of some that there is no distinction between administration and "free administration." Administration of "all the goods" equals "free administration." While "simply" appointed attorneys and attorneys with free administration have writ in common—e.g. make and receive payment, recover, proceed—yet there are many differences also which are set forth at length in the text (*vide*).

8. An attorney *in rem suam* is one who acts for his own benefit, not for his principal's. This may happen by having mandate or cession of the principal's action, when he is a plaintiff *in rem suam*; or by putting himself forward as defendant, and taking risk of result; or where a surety sued asks principal debtor to defend him, which such debtor then does at own risk. But the cases of such plaintiffs and defendants differ: for another plaintiff may be substituted without a defendant's consent and against it; but not another defendant. For the risk of the execution passes to such second defendant, away from the first. Therefore it is MORE CORRECT to say plaintiff's consent is necessary, or his condition would be made worse: not defendant's, for he can always release himself by payment. An attorney *in rem suam* litigates at his own cost.
9. Attorneys are appointed by mandate, either express or implied: *express*, by writing, special messenger, or on the record; *implied*, by presence and knowledge of another's acting in my affairs, not by mere silence. IN PRACTICE, powers of attorney to carry on suits are, to prevent doubt, written fully in a public instrument, either executed before witnesses or filed of record. Proof of such mandate by witnesses is incompetent, on account of the delay.
10. If it is clear a plaintiff's attorney has no mandate, he is inadmissible, even on security *de rato*. THIS IS PRACTICE NOWADAYS. Even if attorney is silent, the Judge repels. If admitted by any chance, such attorney's doings are null: a judgment obtained by him cannot be ratified by his own principal, for the right of objection is the adversary's and not the principal's. One can only prejudice himself by his own ratification, and not another. But if sentence passed *against* such attorney, his principal can ratify it; even tacitly, as if he appeals against it, or continue a pending suit before sentence. Voet differs from Gail as to possible ratification in all cases after judgment, holding that the negligence of the client who has allowed a false attorney to appear against him is absorbed in the greater negligence of that attorney himself.
11. "Conjoined persons," i.e. parents, children, brothers, husbands, affines, &c., can act for each other without mandate in ordinary remedies; likewise co-parties to a suit after contestation. But they must all give security *de rato*, and the party for whom they appear must consent. A limited mandate to a husband by a wife is a tacit prohibition to appear *ultra*. In extraordinary remedies, even conjoined persons must have a mandate or the expressed wish, except a father praying restitution for his son.
12. If a mandate is clear there is no need of security *de rato*, unless it is insufficient for the purpose, or general where it should be special. If it is defective only, the attorney may appear on security *de rato*, and on condition of filing a new power.
13. If a conjoint person or an attorney thus act without mandate, and fail, they must themselves bear the costs, without right of recovery. Attorneys are further liable to a discretionary penalty (i.e. a fine).



14. An attorney can intervene in all civil cases unless the Judge require the principal's presence. The Judge must be every way obeyed, or there is a punishment for contempt. It will be sufficient if he then sends an attorney clothed with the fullest power, unless the Judge still requires presence, for just cause. In criminal cases personal appearance of the accused is necessary. [Obsolete portion as to Roman system of criminal procedure omitted.]
15. BY OUR LAW also a criminal defendant must appear in person, although the Court may allow him professional assistance.
16. In popular actions, an attorney could appear for the defendant, but not for the plaintiff.
17. An attorney's duty is diligently to fulfil his mandate conventionally in the action as well as reconventionally. He is liable to his client for fraud and for negligence: the client recovering under the action of mandate, or sometimes by restitution: not only where there is fraud in the adversary, but where there is none. This especially BY OUR LAW, for it provides a limited number of practitioners, and the client cannot suffer for employing them.
18. An attorney losing a suit must appeal from a wrong sentence, but need not prosecute, unless appointed "for all the cause." But NOWADAYS, as appeal Court attorneys differ from lower Court attorneys, the duty of the attorney ends with the appeal. A new power is required for the appeal, unless the original power included appeal. Nor can the lower Court attorney appoint a higher without mandate. No one can confer more right than he possesses. An attorney appointed to sue cannot compromise, nor proceed in another Court than that named; except to prosecute something merely accessory to his original obligation: thus one authorised "to recover" can demand production of documents, and one authorised to pray a testamentary legacy can demand sight of the will.
19. An attorney appointed to conduct a suit becomes "ruler of the suit" (*dominus litis*) by contestation of suit; is cited, &c. But extra-judicial attorneys do not. Contestation of suit is a quasi-contract, inducing as it were a novation and delegation. Even before contestation an attorney can be forced to defend, if his mandate is clear and his principal has, with his consent, given security to fulfil judgment. Just cause, e.g. enmity, excuses the attorney. A conjoint person suing can be forced to defend reconventionally, for an action includes reconvention. But he may drop the action. An attorney specially defending only is not bound to proceed further than the defence.
20. Judgment is given against an attorney contesting the suit, although the execution must be on the client's goods, unless in cases mentioned *ante*, where the attorney has made himself subject to execution, or forsakes a suit at a suitable moment.
21. The office of an attorney ceases: a, by his death—the principal is then cited to appoint another; b, by the principal's death, if the transaction be yet entire, otherwise not. His heirs are cited WITH US to continue the action.
22. c. by the attorney's renunciation for just causes, enmity, ill-health, travel, state-service, insolvency.
23. The mandate of an attorney can be revoked at any stage of the suit, without the adversary's consent. *Quere*, if without the attorney's. In the Roman law there was a distinction as to before or after contestation of suit, just cause being required in the latter case. But BY OUR LAW an attorney is not the ruler, but the server of the suit, and therefore his mandate can be recalled at any stage of it, without cause stated. But a procurator *in rem suam* cannot be revoked, nor can a mandate be partially revoked, if the agent refuses. A false attorney can be repelled at any time without cause.
24. A prior general mandate is not revoked by a subsequent special mandate. Nor is revocation of mandate presumed: it must be proved. If you give a

power to Nævius and then the same to Titius, the latter is a revocation of the former.

25. A "defender" differs from an attorney in that he needs no mandate, as long as he gives security "to fulfil the judgment," sometimes "to ratify." He must be a major: otherwise a "restitution" might render the whole suit vain.

1. THERE was hardly any use of old, in legal proceedings, for attorneys, who administer the affairs of others under mandate of the owner, inasmuch as a person could only proceed in his own name and not in the name of another, except in a few cases; but since sickness, age, necessary journeying, and unskilfulness in court matters, and many other causes, were often impediments to persons, so that they could not themselves well carry out their affairs, they began to proceed and bring actions by attorneys: *pr. Inst. de iis per quos agere possumus* (I. 4. 10.). Nay the necessity was imposed on illustrious persons of appointing an attorney for themselves at a trial, lest their own presence and authority should take away the free power of vote: *l. qui cunque* 25 *et auth. Loc. jus. C. h. t.* And although of old, by the privilege of Mary of Burgundy, it was left to the discretion of litigants in Holland whether they wished to conduct their court affairs themselves or by an attorney, yet if we look at our own customs, no one can conduct his own cause in court, but it is necessary that he transact his business in the lower courts by an attorney; in superior courts, in cases of greater moment, by an advocate and at the same time by an attorney; while in cases of lesser moment he may use the services of either, and this is necessary lest he should lose his case more from an inexperience in forensic affairs than from the injustice of his case. *Instructions as to smaller cases*, 1579, 21 Dec. art. 23. *Merula prax. lib. 4. tit. 36. cap. 1. num. 5.* *Groenewegen adl. 26. C. h. t. Leeuwen Cens. For. part 2. lib. 1. cap. 5. num. 2. in med.* For this reason it also obtains that no one can promiscuously choose his attorney, nor is that office a private one (as indeed it was among the Romans), but more a public one. So much so, that in every tribunal a certain number of attorneys is found skilled in court style and practice, after the example of what the Romans followed in the case of advocates, beyond which number others are not allowed to give their aid to litigants in trials. Although attorneys differ from advocates in dignity, yet in many respects they are regarded in law as similar to them: in so far as they are bound to take the oath of calumny on entering office, and in the superior courts are bound to renew that oath annually: and can they be forced against their will to render their services as attorneys: and they can recover fees, even those not promised, according to the measure of the suit and their labour, and according to the custom and prescribed manner of each court. Therefore what I have said in tit. 1, "on pleading," as to fees and their collection, are also of application here. See *Instruct. of the Court of Holland*, art. 71. 75. 78. *Andr. Gayl*,

libr. 1. observ. 43. 44. Zypseus notit. jur. Belgici libr. 1. tit. de procurat. Christinæus ad Mechliniens tit. 1. art. 47. Groenewegen adl. 17. C. h. t. et ad tit. Instit. de iis per quos agere possumus (I. 4. 10.). My father P. Voet ad d. tit. Instit. num. 2. Leeuwen Cens. For. part 2. libr. 1. cap. 5. num. 2. & 11. And as the office of an advocate cannot prejudice nobility, as has been laid down in the tit. "on pleading," so have many writers laid down that the rights of nobility are not extinguished by the discharge of the duties of an attorney in the superior tribunals, such as in the imperial courts. Andr. Gayl, d. libr. 1. observ. 43. num. 6. 7. 8. Andr. Tyraquellus de nobilitate cap. 30. num. 4. et seqq. Zypseus not. jur. Belgici libr. 1. tit. de postulando versa unde et hoc Christinæus ad Mechliniens tit. 1. part 47. num. 4.

2. Every one can appoint an attorney, whether he (the appointer) be the father of a family or a son under power in those causes in which a son can sue or be sued: *l. filius familias 8. pr. ff. h. t.* (a passage as to slavery here omitted). Minors and those under the age of puberty cannot appoint an attorney without the authority of the tutor or curator, *l. neque tutores 11. C. h. t. (2. 13.)*, although a victory gained by an attorney appointed without such authority will benefit the minor: *l. non eo minus 14. C. h. t.* As regards tutors themselves and curators, and even attorneys themselves, and those filling a similar position, inasmuch as before the "contestation of suit" they are neither "masters of the suit" (*domini litis*) nor of the goods (*rerum*), and the mandate of the owner is still required in order to constitute an attorney, *domini l. 1. ff. h. t.*, they were thus wanting in the power of appointing attorneys; but after the clear contestation of suit, that right was permitted to them as being then made masters of the suit by the contestation: *l. quod quis 8. l. neque tutores 11. l. nulla 23. C. h. t. (2. 13.)*. BY OUR LAW, however, and the law of other countries, it is RECEIVED PRACTICE that tutors and curators can even before the contestation of suit legally appoint an attorney for their minors' business, and this is DAILY DONE. *Groenewegen ad d. l. 11. C. h. t. post alios ibi citatos.* The same is the case as to an attorney appointed for a lawsuit, for as it is received practice in regard to attorneys in extra-judicial matters, that they can substitute another attorney, *l. procuratorem 1. § si quis 13. ff. mandat. (D. 17. 1.)*, and as, by the contestation of suit, no attorney is made "master of the suit," but only a servant (*minister*) of the suit, there is no reason why substitution shall not be also allowed to the attorney before the contestation of suit, even if no power of substituting was contained in the instrument of mandate (*power of attorney*); although it is safer that such power of substitution should be inserted in the mandate. *Instruct. of the Court of Holland, art. 90; of the Supreme Court, art. 126; of the Ultrajectine Court, tit. 5. "of attorneys," art. 4. Christinæus ad Mechliniens, tit. 1. art. 25. num. 8. S. van Leeuwen Cens. For. part 2. bk. 1. cap. 5. n. 7.* In Germany, however, it even yet obtains, following more the Roman law, that an attorney cannot substitute unless there has been contestation of

suit, whenever no right of substitution is found nominately given in the mandate. *Berlichius decis.* 274. num. 6. 7. 8. *et seqq.*

3. This point is not free from doubt, whether an attorney appointed by mandate for the purpose of carrying on and administering business matters can appoint an attorney to a suit (*procurator ad lites*). I think (*existimo*) that the decision of this question must depend on the wideness or narrowness of the mandate. For if the power of an attorney appointed to carry on business (*ad negotia dati*) be so restricted that he has only the power of administering, not of litigating or of bringing an action, it is certainly in vain that an attorney should desire to transfer to another by substitution more right than he himself has : *arg. l. liberte* 81. § *pen. ff. de negot. gestis* (D. 3. 5.). But if a freer administration were granted to him, so that the same things were permitted to him which the principal (*dominus*) might do, on grounds of advantage (*ex utilitate*), there is nothing in the way of his substituting an attorney to bring actions in the name of the principal : inasmuch as he himself has the power of litigating for the principal according to the provisions of the civil and canon law : *l. procurator* 58. *ff. h. t. l. nam. et nocere* 12. *ff. de pactis* (D. 2. 14.); *arg. l. creditor* 60. § *ult. ff. mandate cap. qui generaliter* 5. *de procurator* in 6; and that the right of staying or arresting is competent to such an attorney is very fully proved in the *Tit. de in jus vocando* (*ante*, Bk. 2. tit. iv. *ante p.* of this Trans.). *Christineus ad Mechliniens tit.* 1. *art.* 25. num. 7. 8. *Argentæus ad consult. Britt. art.* 97. *not.* 2. num. 1.

4. Any one can be appointed an attorney who is not a prohibited person, whether he be a "father of a family" or the "son of a family" : *l. si filius fam.* 8. *in fine princip. ff. h. t.; cap. generaliter*, 5. *in med. de procurator* in 6. But when attorneys are appointed to extra-judicial matters (as to whom elsewhere) or to lawsuits, a criminal defendant who is not yet declared innocent cannot be so appointed, *l. reum* 6. *C. h. t.* Nor a decurion, *l. si quis procuracionem* 34. *C. de decur.* (C. 11. 13.), nor a soldier, unless to deal with the common goods of his division of the army, and as to which he may assist them without offending against military discipline : *l. qui stipendia*, 9. *C. h. t. filius familias*, § 8. *veterani* 2. *ff. h. t.* Nor an infamous person, not even by the new law : for by it the cessation of the exception of "infamous procurator" has only been decreed lest the suit should be protracted while the infamous person is meanwhile repelled by the judge : § *ult. Instit. de except.* This is also preserved by use in the case of those who carry on a public procuratorial office : *Zangerus de exception. part.* 2. *cap.* 8. num. 101. 102. 103. *Andr. Gayl, libr.* 1. *observ.* 43. num. 7. Nor can a woman be appointed : *l. 2. ff. de regalis jur.* (D. 50. 17.), *l. alienam*. 18. *C. h. t.*; unless for her own affairs (*in rem suam*), or for her parents who are prevented by age or sickness, or by having no one who can proceed for them : *l. fœminas* 41. *ff. h. t. Sande decis. Fris. libr.* 1. *tit.* 3. *defin.* 4. But not for her children, because these can be sufficiently provided for by praying for a tutor in ordinary process : nor can she appoint for her parents in ordinary cases : *d. l.*

alienam 18. *C. h. t.* (2. 13.); *l. liberto*, 31. § *pen. ff. de negot. gestis* (D. 3. 5.). And as IT IS OF THE CLEAREST PRACTICE in our courts that no woman, and no soldier during the period of service, can be entered on the solemn and fixed number of court procurators, so, on the other hand, there is nothing forbids that a woman or a soldier be appointed by the principal under a general power with the free administration clause (*cum liberâ*) containing also the liberty of carrying on lawsuits, or under a special power to recover a certain thing in court, provided they avail themselves of the vicarious aid of an attorney appointed to the roll by public authority, in regard to those things which are to be publicly done in court, just as and whenever any other person being a male would be bound to use such services: *Groenewegen ad. l. 18. C. h. t.*: so that a wife who is the attorney of her husband appointing her can in that way carry on a suit is PERFECTLY CLEAR (*in aperto est*). *Rodenburch de jure conjugum tit. 3. cap. 1. num. 3. Groenewegen d. loco.*

5. Whether, however, a married woman can, without the consent of her husband, act as an attorney in the suits of others, on the mandate of a stranger whose suit it is, is not without its own reason OF DOUBT. If you regard a woman married to a man, and therefore subject to the perpetual guardianship of her husband, as being simply a minor, it follows that, although she cannot carry on a suit in her own name, her husband having to do so for her, yet she can do so for others, on the analogy of minors who have completed their seventeenth year (as will be presently said), and of many others who are prohibited from proceeding in court in their own name, but can do so in another's name, so that they cannot be repelled, by the procuratorial exception, by the adversary of the person appointing them: which opinion also Tyraquellus defends by reasoning of the same nature: *de leg. conn. gloss. 5. num. 171. et multis seqq. Chassaneus ad consuetud. Burgundiæ rubricâ 4. § 1. in verbis "contractus inter vivos" num. 24. cited by Rodenburch tract. de jure conjug. tit. 3. cap. 1. num. 2.* NOR DO I SEE ANY SUFFICIENT REASON why Rodenburch wished to dissent from this opinion, *d. loco*, led away by arguments having a certain appearance of, but certainly no real weight. For if you declare an unmarried person, or a widow, competent to bar suits on another's mandate, or to prosecute on it in the courts, and if the modesty due to sex be no impediment to their following the legal crowd, if they may go to law and enforce process for the sake of furthering or terminating a suit; neither will it be a disgrace or dishonour to a husband if his wife should conduct business, although he be unaware of it; for you should not require nor seek that a different modesty, becoming the sex, be observed in the case of married women than in virgins or widows, nor can that be considered shameful in a married woman which is consonant with modesty in an unmarried. For what Constantine wrote by way of rescript in *l. Maritus* 21. *C. h. t.* (2. 13.), that husbands may appear in a suit for their wives without mandate, "lest women, under pretext of prosecuting a suit, should irreverently

rush in, to the contumely of matrimonial shame, and be forced to be present at their husbands' contracts or at trials," was not so written in order that women should be repulsed, but only for this reason, that a power was given to husbands, who were perchance fearful of the bashfulness of their wives, to appear for them in court, thereby obviating the necessity of the wife's being herself *compelled* to be present in court proceedings, for, as he urges, "it is to the interest of the husband not to be defrauded of that assistance of his wife which she is wont to give to domestic affairs": that, however, would be the result if she could carry on judicial business without the consent of her husband, neglecting her household duties, for what else, I PRAY, is to be inferred therefrom than that the husband, by virtue of his marital power, if he consider this charge of another's matters so undertaken by her to be serious and injurious to him, may stop it himself and keep his wife at home. But that reason cannot at all events affect the adversary of him who has given the wife this mandate; nor can any right then accrue to him of repelling the wife by the procuratorial exception, and delaying the suit, as long as the husband himself, whose sole interest it is, does not interfere.

6. Minors under twenty-five,* provided they have completed their seventeenth year, can no more be prevented from discharging the office of an attorney than from pleading . . . [passage as to slavery omitted]. . . Nor should it be feared that trials would thus be rendered illusory, as perhaps a minor under 25, after having wrongly conducted a suit, should obtain "restitution"; for no damage threatens the attorney from such suit, whether well or badly conducted; it only threatens the principal; for the execution of the sentence is not to be directed against the attorney, but against the principal himself: *l. si se non ff. de re judic.* (D. 42. 1.): the fear of such a restitution is vain, as no loss to the minor appears. Nor does the jurisconsult contradict this in *l. cum mandatu*, 23. *ff. de minoribus* (D. 4. 4.), where he says that sometimes an attorney under age may be injured, if, for instance, he cannot recover his costs from his employer, and, on that account, is to get "restitution." For, in the first place, that title of the law does not treat of attorneys conducting suits, but conducting extra-judicial matters, the payment, perhaps, of money. And even if it be taken as referring to an attorney in court, the trial would not thereby be rendered illusory, for the minor could not pray relief as against a sentence which could not prejudice him, but only his principal; but would pray it against the mandate he had undertaken, and in the execution of which he had suffered injury, and would therefore rather pray it against the payment of costs made by him. And although the canon law repels minors under 25 from the office of attorney in as far as regards judicial business, *cap. qui generaliter*, 5 *in fine de procurator*, in 6, yet it is MORE CORRECT TO SAY THAT THAT IS NOT FOLLOWED IN PRACTICE, for experience shows that minors are no less inscribed on the public roll

* Twenty-one is, of course, the colonial age of majority.

of attorneys than on that of advocates: *Sande decies. Frisic. lib. 1. tit. 3. defin. 3.* Not to add that this disposition of the canon law has had its origin in nothing but an olden common error of the commentators; so that it is not surprising that on a discussion as to this error with regard to the Roman decrees, now more fully explained, this rescript of Bonifacius has even been disapproved in court. But it would be different in the cases of those defending without mandate, for as they then conduct judicial matters at their own risk and suffer execution of the sentence, *d. l. 4. de v. jud.* (42. 1.), they ought to be of that age that a restitution on the ground of minority cannot take place, and therefore should be majors, lest otherwise both they and their sureties should be assisted by way of "total relief" (*restitutio in integrum*), and thus trials be rendered illusory: *l. minor 51. ff. de minor 25 annes* (D. 4. 4.); *l. exigendi 12. C. h. t.* (D. 2. 13.).

7. An attorney is either general or special; which division equally pertains to judicial and to extra-judicial matters. He is said to be a special attorney who is appointed to carry out a certain cause or act; he is said to be a general attorney to whom the carrying out of all matters is entrusted. And the latter again is either appointed "with a free administration," or simply no power of free administration being added. He who is appointed with "a free administration" can do almost all that his principal can, so that he can alienate his principal's goods and transfer the *dominium* to the party accepting it, not only when necessity demands, but when the advantage of the principal so recommends it: *l. creditor 60. § ult. ff. mandati* (D. 17. 1.); *l. procurator 58. ff. h. t.* (33.) *§ quâ ratione 43. Instit. de rerum dei* (1. 2. 1.); *l. quâ ratione 9. § 4. nihil ff. de acquir. per. dom.* (D. 41. 1.), whence he is said to have a "full mandate," in *d. l. 60. § ult. mandate* (D. 17. 1.); the right of donating being alone denied to him, since "to donate" is rather "to destroy" than "to administer": *l. contrajuris 28. § ult. ff. de pactis* (D. 2. 14.); *l. filius familias 7. pr. et § 3. ff. de donation.* (D. 39. 5.). But he to whom the simple administration is mandated cannot alienate either movables or immovables nor slaves, without a special power from the principal, excepting the case of "fruits" and other things which can be easily destroyed: *l. procurator totorum 63. ff. h. t.* (3. 3.). In vain is it put forward to overturn this ranking division of attorneys, that he who has administration can alienate, *l. per § sed et si 3. ff. de divers. temp. prescript.* (D. 44. 3.), and that he cannot do more to whom a free administration has been granted: *l. si convenerit 18. § ult. l. 19. ff. de pignorat act.* (D. 13. 7.); *l. filias fam. 7. ff. de donat.* (D. 39. 5.); *l. contra 28. § ult. ff. de pactis* (D. 2. 14.); *l. si pater 12. ff. quæ in fraucl. cred.* (42. 8.); *l. si quis hoc 41. § ult. ff. de vi vind.* (D. 6. 1.); *l. si servus 14. ff. de acquirend. possess.* (D. 41. 2.); *l. si liberum 10. C. quod cum es qui in alien. potest* (C. 4. 26.); *l. sicut re 8. § an pacisci 5. ff. quib. mod. pign. solc.* (D. 20. 6.); *l. 1. § 1. ff. quæ res pign.* (D. 20. 3.). [After referring to slaves and the peculium of filii familiarum, and to there being in

their case no distinction between the terms "administration" and "free administration," both obsolete, he proceeds] But as this is otherwise in the case of an attorney, you cannot extend the argument of the former to the latter. Besides, a distinction was drawn by the authors of our law between a "simple administration" and a "free administration," and that those who had a free administration could do more than those who had not a free administration, but a simple administration of goods can be shown from the passages as to slaves and filii familiarum cited above, for it is not probable that mention would be made in so many places of a "free administration" if there were not also another administration which is not free. Nor should it incline us to the contrary view that what in one passage is allowed to a general attorney "with free administration," is in another place found allowed to an attorney having a general power without any mention of a free administration: thus a general attorney "with a free administration" can make payment and can collect, and therefore can even take court proceedings, and can alienate by selling and exchanging one thing for another: *l. procurator cui* 58. *l. 59. h. t.*; *l. qua ratione* 9. § *nihil 4. ff. de acquirend. dominio* (D. 41. 1.) § *qua ratione* 43. *Instit. de rer. div.* (1. 2. 1.). These can also be done by him to whom the administration of "all the goods" is committed, without any mention of "free administration": thus he can make payment: *l. quod libet* 87. *ff. de solut.* (D. 46. 3.) *l. si procurator* 6. *de cond. indebiti* (D. 12. 6.): he can bring an action, *l. sed si unius* 17. § *procurator autem* 16. *junct.* § 15. *ff. de injuriis* (D. 47. 10.); he can alienate fruits and other things which can easily be destroyed: *l. procurator totor.* 63. *in fine h. t.* (38.). For it should be understood that although it cannot be denied that a general attorney with free administration has many things in common with him to whom the administration of all goods has been mandated "simply," without the addition of "free administration," and that therefore it is true that both can make payment (just as payment can also be made to both, *l. vero* 12. *l. qui hominem* 34 § *si Titium* 3. *ff. de solut.* (D. 46. 3.); that both can call in and bring action; that both can, on any necessity, alienate fruits and other things which are easily destroyed; yet this does not prevent there being differences in other respects. Thus a general attorney with free power cannot only alienate, on necessity, things which would easily be destroyed, but also all others whatsoever, by bartering them, by selling them, by negotiating them, or by operating in other ways to the advantage of the principal mandant, provided only he so acts as to alienate with an intention of administering and *bonâ fide*, not fraudulently, as has before been said, according to *l. creditor* 60. § *ult. ff. mandati* (D. 17. 1.); *l. procurator* 58. *ff. h. t.* On the other hand, a general attorney without free administration, to whom things are given to be administered, is bound by this rule that he cannot alienate the goods of his principal, whether movables or immovables [nor slaves], without the special mandate of the principal, but can only alienate fruits or other things which can easily be destroyed: *d. l. 63. ff. h. t.* The former

can, *bond fide*, pledge the goods of his principal for his debts, whenever the advantage of his principal demands it: *arg. d. l. 60. § ult. ff. mandati* (D. 17. 1.); *l. si conveniret* 18. § *ult. l. 19. ff. depignorat. act.* (D. 13. 7.). The latter only has the power of pledging if the administration of "all the goods" (*universorum bonorum*) has been allowed to him by one who was accustomed to receive borrowed moneys under pledge: *l. solutum* 11. § *ult. l. 12. de pign. act.* (D. 13. 7.). He does so, in so far, on necessity, for the condition of the principal was such that he could obtain credit without pledge, for a pledge would not be lightly given by one who could obtain credit without it. Again, he can "proffer oath": *l. jus jurandum* 17. § *ult. ff. de jure jurando* (D. 12. 2.). And for the same reason he can compromise, both because an oath partakes of the nature of a compromise, *l. 2. 31. ff. de jure jurando* (D. 12. 2.), and because it is of more moment to proffer oath than to compromise, since those to whom the proffer of an oath is denied have still the power of *bond fide* making a compromise; for instance, the administrators of the goods of a corporation: *l. jus jurandum* 34. § *defensor* 1. *ff. de jure, jurando joined to l. prævi* 12. § *de transact.* Add the title on compromises (3. 2.), *ante, part vi. num. 2.* The latter (i.e. a general attorney without free administration), however, can neither compromise nor, as a consequence of the argument above, proffer oath: *l. mandate generali* 60. *ff. h. t.* In this way the attorney of fisc, who has, it is true, a general power but not a full mandate with power of alienation, is said to act "without result" (*nihil agere*) whenever he does anything by way of sale or compromise: *l. 1. § 1, ff. de offic. proc. Cæsires* (D. 1. 19.). And although in the said *l. 17. § ult. ff. de jure jurando* (D. 12. 2.) it is said that an attorney can proffer oath if he has the administration "of all the goods," no mention being made of *free* administration, yet it is necessary and behoves us to accept that passage, which is one by Paulus, as referring to him who has a "free administration," since the same Paulus has laid down that a general power does not include a compromise entered into for the purpose of deciding a dispute, *d. l. 60. ff. h. t.*; which two views cannot at the same time be consistent according to what has been said before, unless the *d. l. 17. § ult.*, be received as referring to him who has a full mandate, and thus a general mandate with free administration. Nor will you rightly object that even a general attorney without free administration can compromise because he can receive payment, *l. prescriptum* 10. § *ult. l. 11. 12. 13. ff. de pactes* (2. 14.), as has already been intimated above regarding payment. For I do not read in the said "laws" of a compromise, but of a pact to one to whom payment can also be made; but the argument that because you can pact therefore you can compromise has no force. For even he who has a simple administration, and not a free administration "of all the goods," can lawfully pact, so that by pact he can even injure the principal according to the said "laws," because if by a pact, which is wont to be entered into as to certain and not as to doubtful things, he have injured his principal, a recourse by the action of mandate is open to the

prejudiced principal for indemnity. But the reason for his not compromising who has not a general mandate with a free administration is that, in a compromise *bond fide* made by him as to a doubtful suit or uncertain thing, without the remission of a liquid right, the damage caused by the compromise is not sufficiently apparent, on the analogous argument of what is laid down in *tit. de transactione num. 24. (ante, pt. vi.)* as to non-rescission of compromises on the ground of "enormous loss": and therefore no action of mandate from that cause seems to be provided for the principal: wherefore it is not to be supposed that the principal wished also to give the power of compromising to those to whom he gave the power of pacting, inasmuch as though he could have recourse against those pacting, he could not have recourse against those compromising. It is of little moment that in the "Basilica" the Greek text of *l. 58. ff. h. t.* has not the words "free administration," or words similar, because many other things are omitted in those books, the authors of the Greek version having everywhere studied brevity of diction.

8. There is also an attorney *in rem suam*, that is, one who does not carry on business for the benefit of the principal, but for his own benefit, *l. si se rem 4. ff. de rejudicata (D. 42. 1.)*; *l. quia absente 4. C. h. t. (C. 2. 13.)*; *l. jus jurandum 17. § ult. ff. de jure jur. (D. 12. 2.)*, whether the actions have been mandated to him or ceded, by which actions he then proceeds as plaintiff: *d. l. 4. C. h. t. tot. tit. ff. et Cod. de hered. vel act. vendita (D. 18. 4. C. 4. 39.)*, or whether he put himself forward in the suit for the defendant, and took upon himself the risk of the trial: *d. l. 4. ff. de re judicata (D. 42. 1.)*; *l. sed et si 25. § item si rem 17. in med. vers. quid tamen ff. de petit. hered. (D. 5. 3.)*; *l. si actor 29. ff. h. t. (3. 3.)*; *l. quia etiam 3. § ult. ff. de alienat. judicii mut. causa (D. 4. 7.)*; or whether a surety or a constitutor (i.e. a verbal surety, *vide 13. 5. 1.—Tr.*) being afterwards sued, appoints the principal debtor for whom he intercedes as an attorney to defend him, for in that case such an one defends at his own risk: *l. licet 42. § ea obligatæ 2. ff. h. t. l. idemque 10. § generalite 12. ff. mandati (D. 17. 1.)*. There is, however, some difference between these; for when another is, by means of a cession of action, substituted in the place of a former possible plaintiff, that can be done even if the debtor be unwilling or prohibits it: *l. nominis 3. C. dehered. vel act. vendita (C. 4. 39.)*; *l. 1. C. de noration. (C. 8. 42.)*. But when another puts himself forward in a trial for the defendant, at the defendant's wish, he does not put himself forward as a mere defender of the defendant, but as one on whom the burden and execution of the condemnation will fully attach themselves (*redundaret*), the principal debtor being withdrawn and released. This cannot, it is MORE CORRECT TO SAY, be done, except with the concurrent consent of the plaintiff, lest otherwise a less suitable defendant be put in the place of a suitable one; and therefore if the plaintiff prefers to sue the principal rather than him who is an attorney *in rem suam*, IT IS TO BE SAID that he can do so. Thus Ulpian *in d. l. si actor 29. ff. h. t.*; *arg. l. ratio 2.*

C. de hered. vel act. vendita (C. 4. 39.). The well-known rule, "that the plaintiff is not permitted to do that which the defendant is not permitted to do," is not opposed to this: *l. non debet* 41. *ff. de reg. juris* (D. 50. 17.). For that axiom fails in those cases in which the reasons applying to the cases of the plaintiff and defendant are different, and that is so here, because the debtor, by substituting another less suitable debtor in his place, can make the condition of the creditor worse, but the debtor will always be released in the same way by payment before or after the cession, nor is his case made worse by the cession. Besides, an attorney in *rem suam* differs from a simply appointed attorney, not only in this, that when "constituted" in *rem suam* in a trial, he remains in it for his own advantage, and if he is a defendant the action on the judgment is given against him: *l. si se non* 4. *ff. de rejudicata* (D. 42. 1.), but also in this, that he carries on the suit at his own cost; whereas, on the other hand, a simple attorney litigates at the cost of the principal mandant himself. *Ant. Matthæus de auction. libr. 2. cap. 5. num. 24. in fine.*

9. For the appointment of an attorney a mandate is necessary, and that is either expressly interposed by writing or by a messenger (*nuncium*), or by putting "of record" before the presiding judge or magistrate, *Paulus recept. sent. libr. 1. tit. 3*; or tacitly; although this tacit mandate is not gathered from the mere silence of him to whom the mandate is given: *l. filius familias* 8. § *invitus l. h. t.* Yet it is presumed from the silence of one who is present and knows that another has intervened to carry on his affairs; so that he is understood to be your attorney, to whom you have permitted to be plaintiff or defendant in your affairs: § *procurata* 1. *Instit. de iis per quos agere poss.* (1. 4. 10.) *arg. l. si remunerandi* 6. § *si passus* 2. *l. qui potitur* 18. *ff. mandati* (D. 17. 1.); *l. si fide juror* 6. *C. Cod. tit. (4. 35.)*. BUT IT HAS BECOME PRACTICE, for the purpose of removing all doubt, that powers of attorney to carry on lawsuits should be issued written fully in a public instrument, whether before an attorney and witnesses, or whether (as the Gelrians, the Transilulani, and the Brabantines require) completed "on the record." *Zip. not. jur. Belgici libr. 1. tit. de procurat. circa princip.*; my revered father *P. Voet on Statutes, sect. 10. num. 11. vers. hinc etiam et ad § ult. Instit. de iis per quos agere possumus, num. ult. (1. 4. 10.)*; *Sim. van Leeuwen cens. forens. part 2. libr. 1. cap. 5. num. 8*. It is a consequence of this that a mandate to carry on a suit is not rightly proved by witnesses, lest by the examination of witnesses and postponements time is taken up, the principal subject matter being meanwhile put off. *Vide Mascardus de prob. conclus. 1014, mandatum probetur nec ne, per testes.*

10. Therefore no one is to be admitted in a trial as an attorney for a plaintiff, if it is clear that he is without a mandate, even if he have given security *de rato*, WHICH IS ALSO THE PRACTICE NOWADAYS. *Groenewegen ad § 3. Instit. de Satisf. (1. 1. 24.)*, so that even if the

adversary be silent, the judge will demand the power, and if a false attorney be found, will repel him, nor allow a controversy to be carried on by him, *l. licet* 24. *C. h. t.*; for although it is found laid down as a penalty upon one contumaciously not giving security as to "depending danger" (*de damno infecti*), that he who refuses to give security cannot put forward the procuratorial exception against an attorney demanding security for another, *l. inter quos* 39. § *aliena* 3. *ff. de damno infecti* (D. 39. 2.), yet that does not prevent the judge, by virtue of his office, repelling one whom he discovered to be without a mandate. If any one who was without a mandate, and the defect of a mandate was clear, was nevertheless admitted as an attorney for a plaintiff, whatever is done by the "false attorney" is *ipso jure* void, *d. l. licet* 24. *C. h. t.*; nor is the judgment confirmed by the ratification of him in whose favour it is passed, inasmuch as he cannot take away by his ratihibition the right of objecting to the nullity of a sentence, which right was once gained by his adversary. For although a ratihibition is similar to a mandate, and retrobates to, entirely, and confirms what has been already done, *l. ult. Cod. ad Senatusc. Macedonian* (4. 28.); *l. semper qui* 60. *ff. de reg. juris* (D. 50. 17), yet this does not happen if thereby a right gained by a third person is taken away, for one can only prejudice oneself by one's own ratification. For thus when a possession of goods had been gained for another without mandate, ratification could not be interposed after the lapse of that day within which possession of goods had been sought, for no other reason, AS I THINK, than that there had already begun to be room for claim for those of the following degree of succession on the lapse of that day, and their thence gained right of seeking the prætorian inheritance was not to be taken away by an unseasonable ratification: *l. bonorum* 24. *ff. rem ratam haberi* (D. 46. 8.). Clearly, if a sentence had been passed against a false attorney, nothing would prevent the principal confirming it by ratification; for thus he renounces his own right only; which ratification can also be collected from this, that a principal appeals to a higher tribunal from a sentence passed against a false attorney: *l. num. minor* 3. §. *ult. ff. rem ratam haberi* (D. 46. 8.). Pending the issue also of a still uncertain lawsuit, the principal can ratify, before sentence, what has been done by a false attorney, for as yet there is no right gained to any one, and therefore nothing can seem to be taken away by the then interposed ratification: *l. licet verum* 56. *ff. de judiciis* (D. 5. 1.). So also a tacit ratification suffices in such a case as when the principal further prosecutes the suit which the attorney had begun: *l. non tantum* 5. *ff. rem ratam haberi. Fachinæus contro. libr. 8. cap. 61. Mynsingerus cent. 1. observ. 44. Ant. Faber Cod. libr. 2. tit. 8. de procurator defin. 10. num. 4. in notis. Berlichius, part 1. conclus. practic. 14. num. 121. et multis seqq. Andr. Gayl, lib. 1. observ. 47. num. 3.* Although this last author tells us that it was decided by the Court that a ratification ought to be admitted in every case after judgment, *de obs. 47. num. 5*, yet it can be gathered from what has

above been said that the grounds of that decision are weaker ; for although there is a certain negligence on the part of him, who, owing to his less careful enquiry, has allowed a false attorney to continue against him in a trial, yet as the blame of that false attorney himself is greater, that lesser negligence is absorbed in the greater blame of the attorney.

11. This is allowed to "conjoined persons" (*conjunctæ personæ*), that even those wishing to act without a mandate are allowed to appear for a conjoined person : such are, children, parents, brothers, affines, freedmen, *l. sedet hæc* 35. *ff. h. t. l. exigendi* 12. *C. h. t.* (C. 2. 13.); *l. si quis apud* 3. § *sed et si forte* 3. *ff. judicatum solvi* (D. 46. 7). *Instructu Curie Brabant. art. 325, Christineus ad leg. Mechlin. tit. 1. art. 25. num. 13. et seqq.* ; and a husband for his wife, *l. maritus* 21. *C. h. t.* (2. 13.); *l. ult. Cod. de pactis conventis* (C. 5. 14); also a consort (co-party) of the same suit for the other consorts, if they have first contested the suit, but not before the contestation of suit, *l. 2. C. de consortibus ejusdem litis* (C. 3. 40.); provided these persons interpose the security that they will ratify the result (*de rato cautionem*), *d. l. 21. C. h. t.* (2. 13.); *d. l. 2. C. de consort. ejusd. litis* (C. 3. 40); *l. si autem* 8. *ff. de negotiis gest.* (D. 3. 5), with the exception of a husband claiming the paraphernal debts of his wife ; for he is not even to be burdened with the caution, *de rato d. l. ult. C. de pact. convert.* (C. 5. 14.); provided, however, that in most of these cases the will of him who wishes to proceed for the conjoined person is not contrary : *l. Pomponius* 40. § *ult. ff. h. t.* (D. 3. 3.). Wherefore, although a husband rightly acts for his wife without a mandate, yet if the wife has mandated to the husband a certain business or a certain suit, as by this very fact she seems to have tacitly prohibited him from carrying on any other business, he therefore ought only to carry out that which is prescribed in the power of attorney given : *l. maritus* 21 *in fin. C. h. t.* (C. 2. 13.); provided only that the question is as to ordinary remedies and actions to be instituted : for if the extraordinary remedy were to be prayed for of restitution in integrum, or any similar remedy, no one can pray this without a mandate, except a father for his son : other cognates and affines cannot do this except with the concurrent wish of the person himself to be restituted : *l. patri* 27. *ff. de minor 25 annis* (D. 4. 4.).

12. But if it is clear that a power has been given to the attorney, security as to ratification is superfluous, *l. 1. C. h. t.*; *l. si procuratorem* 65. *ff. h. t.* (D. 3. 3.); unless the power be insufficient, being perhaps general when a special one is required, as in the denouncement of a new work (*novi operis nunciatio*), *l. de pupillo* § 5. *qui procuratori* 18. *l. cum procurator* 13. *ff. de operis novi nunciatione* (D. 39. 1.); or in a petition of restitution, *l. 26. ff. de minor.* (D. 4. 4.); but if there be a doubt as to the power, the attorney will only be to be admitted if he give security to ratify, *l. 1. C. h. t.* (2. 13.), and thus although in Holland and neighbouring places only attorneys authorised by a lawful mandate can appear for a plaintiff or an appellant to begin a suit, *Instruct. Curie Holland. art. 52.* ; *Curie Supremæ, art. 169* ; *reglement op. de expeditie van justitie voor*

de Hooge Rade, 7 July 1658, art. 20; yet if the power be found to labour under a defect in any part, as if it were not granted with solemnities but only by a private letter, or is imperfect in any other way, the attorney will be meanwhile admitted for his principal, under security that he will exhibit a fuller and more lawful mandate, with the plaintiff's ratification, as *Van Leeuwen* witnesses in his *Cens. For. part 2. libr. 1. cap. 5. num. 4.*

13. When "conjoint persons" are admitted in certain cases without a mandate, according to what has been before said, or public attorneys are admitted without mandate, they appear in court (*sese sistunt*) and bring the action or prosecute the appeal: if they fail and are condemned in the expenses, they bear them themselves, nor have they the right of recovery from conjoint persons nor from others for whom they acted; but are, in addition, to be punished with a discretionary penalty (*pæna arbitrariâ*) if by discharging the public duty of an attorney they have thus put themselves forward to act for strangers, *arg. l. si se non 4. ff. de re judicata* (D. 42. 1.); *Instruct. Cur. Holl. art. 52*; *Jac. Coren. observat. 3.*

14. An attorney can intervene in all civil causes unless circumstances demand the presence of the principal, *l. in pecuniaris 26. C. h. t.* (C. 2. 13.), and this the judge may decree; so that if the defendant do not appear, and the judge orders him to be re-cited, he may add a threat of imprisonment in case of contumacy: not that this is so much advisable on account of the trial and the nature of the action brought, but rather because there has been a neglect and a spurning of the authority of the judge so directing: it behoves that he should be in every way obeyed: as says *Ant. Faber, Cod. libr. 2. tit. 2. defin. 10.* *Joh. Papon. libr. 24. tit. 3. art. 9.* *Alphonsus de Azevedo ad const. reg. Hisp. libr. 4. tit. 3. leg. 15. num. 2.* In such case, however, the defendant will be discharged if he sends an attorney armed with the fullest power, and so instructed that he can supply the presence of the principal, and do, say, admit those things which the principal if he were present could do; unless the judge then decrees otherwise for just cause. *Jason. ad d. l. 26. C. h. t. num. 3. 4. 5.* *Barbosa in collectaneis Cod. arl. d. l. 26. num. 5.* *Azevedo d. loco.* In criminal cases, however, an attorney is not admitted to appear, neither on the side of the attorney, lest by the defendant's absence trials be rendered illusory, nor on the part of the accuser; for the same reason, if on account of the crime not being proved according to the indictment (*vi inscriptionis*) he (the accuser) is to be subjected to the law of "retaliation" (*obsolete* — Tr.) *l. pen. § 1. ff. de publicis judiciis* (D. 48. 1.); *l. 1. ff. an per alium causæ appell. redd. poss.* (D. 49. 9.); *Paulus 5. senten. tit. 16. § 11.* [The rest of this § relates to a mode of criminal procedure now obsolete in many details. It amounts to this only, as of present application, that a criminal must be summoned personally and not by attorney.]

15. Nor does our MODERN LAW differ much from these principles of the Roman law, for by it (our law) it obtains also that an attorney cannot intervene in criminal causes for a defendant, unless this has been

specially decreed by a judge, but that the defendant, being cited himself and to appear in person, ought also to remain present himself until the judge, on his application, remits the necessity. But if he is present he may, with the leave of the judge, use the services of an advocate or attorney, being perchance himself unskilled in forensic matters. And this is so if the accusation be a criminal one and of extraordinary process. *Simon van Leeuwen, Cens. For. part 2. libr. 2. cap. 2. num. 3. 4. et seqq. Merula prax. lib. 4. tit. 36. cap. 1. num. 4. 5. 6. Petrus Romans tract. de foro competente libr. 2. cap. 4. num. 3. Wassenaar, pract. jud. cap. 27. num. 4. 6. 8. 9. 10. [Rest of § obsolete.—Tr.]*

16. As regards "popular" actions, in them the Roman law allowed an attorney for the defendant but not for the plaintiff, for as in this class of actions the power of appearing was competent to any one of the public, and not less to the mandatory than to the mandant, he did not seem to act in another's name to whom the power of proceeding in his own name was given, unless by this popular action he desired to gain what was of private interest, for then it was laid down that an attorney could be appointed, not as if for the popular, but as if for a private interest: *l. licet in 42; l. non cogendum 45. § 1. ff. h. t. l. qui populari 5. ff. de popular. action. (D. 47. 23.)*. And as the accusation of a suspect tutor was as it were public or "popular," § 3, *Instit. de suspect. tut. (1. 1. 26.)*, therefore the accusation of a tutor as suspect is not easily made by an attorney: unless it is clear that he has been nominately empowered by the tutor: *l. non solum 39. § ult. ff. h. t. (D. 3. 3.)*.

17. The office of an attorney is diligently to expedite the cause of his principal, not only in convention, but in reconvention; so that in respect of reconvention he is bound to give security to ratify: *l. servum quoque 33. § ait prætor 3 and 4. ff. h. t. (D. 3. 3.)*, even if the attorney be appointed in *rem suam* according to the distinctions more fully drawn in the *tit. de judiciis (5. 1.)*. If by the fraud or negligence of his attorney the principal was defeated in the instituted cause, or sustained other damage, which might have been avoided by the more exact diligence of the attorney, the attorney is to be condemned to repair the whole loss without doubt, as the ordinary nature of the power by which he is appointed demands it: *arg. l. a procuratore 13. l. in re mandata 21. C. mandati (C. 4. 35.)*, *reglement op. de expediti Van Gustitie voor den Hoogen Rade 7 juli 1658, art. 37. Mynsingerus cent. 5. observ. 53. Treullerus vol. 1. disp. 9. thes. 12. Andr. Gayl, lib. 1. observ. 45. Neostadius de pact. antenup. observ. 1. in notis vers. patron. My father, P. Voet, ad princip. Instit. de oblig. ex quari delecte, num. 3.* For that the fraud of the attorney, committed in the suit entrusted to him, injures his principal, if committed in the matter itself as to which the mandate was given, provided the agent did not exceed the bounds of the mandate, is clear: *l. si procurator 10. C. h. . (C. 2. 13.)*. So that it seems that the principal should be assisted by a "restitution of the whole," if the attorney is not solvent only when the fraud and corruption of the adversary concur;

in which case the action and exception of fraud are given to the injured party: *l. si procuratorem* 8. § *sed et si* 1. ff. *mandati* (D. 17. 1.); *l. si procurator* 9. ff. *de dol. mali et met. excep.* (D.). But even if there be no fraud of the adversary, this is especially to be allowed BY OUR LAW; for inasmuch as NOWADAYS a certain number only of attorneys is appointed, it can scarcely be imputed to the litigant that he availed himself of the services of such an attorney publicly approved. *Vide Neostadius d. loco.*

18. On losing the suit an attorney is bound to appeal from an unjust sentence; but he is not bound to prosecute the appeal, *l. invitus* 17. *C. h. t.* (2. 13.), *arg. l. dominus* 9. *l. si actor* 10. *C. de appellation.* (C. 7. 62.) *cap. non injuste* 14. *extra de procurator*, unless he have been appointed "for all the cause" (*ad omnem causam*), in which case he can also give reasons and grounds of appeal: *arg. l. 2. ff. an per alium causae appell. reddi poss.* (D. 49. 9.).

Although WITH US, and many nations, the question is now superfluous whether he is bound to prosecute an appeal, since in every tribunal a certain number of attorneys is appointed, beyond whom none are admitted, and therefore not even those admitted in the superior tribunals, *Groenewegen ad l. constitutio* 27. *C. h. t.* (2. 13.), which is also according to the Grecian Constitution of Zeno, which is *lex* 27. *C. h. t.*; wherefore the office of attorney, equally with that of judge, is considered ended after sentence passed: *Joh. Papon. lib. 6. tit. 4. assect. 7. Ant. Thesaurus decs. Pedemont* 107 in addition. So that if even the same party can fully bring action equally in the inferior and the superior court, as an attorney publicly appointed and admitted in both, still he must be clothed with a new mandate to carry on the appeal, unless from the very beginning a mandate to bring and prosecute the appeal seems to have been given to him. *Ant. Thesaurus decs. Pedemont* 202. *num. 3. Jac. Cosen observat. 34. num. 11. 30. et seqq.* The consequence of which is, also, that an attorney appointed to bring a suit in a lower court, and there failing, cannot appoint another to prosecute the appeal in a higher court, even one publicly authorised to carry on cases there, unless that power have been nominately given him by mandate, *l. 27. C. h. t.* (2. 13.); for as after sentence the office of an attorney is ended, according to what has been before said, who, I PRAY, will substitute another in his place to carry out that in respect of which he is not himself found clothed with any mandate? Certainly the reason of our law will not allow that any one should confer more right on another by mandate than he himself has by his principal's mandate. *Mantica de Tacitus et ambig. consent. libr. 7. tit. 22. num. 21.* It is here to be observed also, that an attorney appointed to sue cannot compromise: *l. transact. 7. C. de transact.* (C. 2. 4.). (*Ante, pt. 6.*) Nor can he bring an action in another court than that which is included in the mandate, *arg. l. maritus* 21. in *fine C. h. t.* (2. 13.), unless it cohere to the mandated action as an accessory: such as the action "to produce" (*ad*

exhibendum), where the vindication of a thing has been mandated; or the interdict as to exhibiting the testamentary tablets, if it has been mandated, that a legacy should be prayed by virtue of the will: *l. ad rem* 56. *l. ad legatum* 62. *ff. h. t.*

19. By the Roman law an attorney, immediately on contestation of suit, becomes master of the suit (*dominus litis*), and may be cited as such, *l. procurat.* 22. *l. nulla dubitatio* 23. *C. h. t.* (C. 2. 13.); which is not the case with attorneys appointed to extrajudicial matters, where no such contestation of suit is found; for by contestation of suit there is as it were a quasi-contract, *l. licet* 3. § *idem scribit ff. de peculio* (D. 15. 1.); and by it a certain novation is as it were made with the debtor himself. The consequence was that when an attorney intervened and contested the suit, a kind of delegation might be taken to have interceded: *l. delegare* 11. § 1. *ff. denovat et delegat* (D. 46. 2.). The plaintiff's attorney was understood to be in a manner a surrogated creditor, and the defendant's attorney a surrogated debtor, and thus as a principal in the suit. But even before contestation of suit an attorney to the suit can be cited to, and compelled to undertake, the suit, if he be the attorney of the defendant, and if it can be shown that a mandate was given to him for the defendant, provided the defendant, with his consent, gave the caution to fulfil the judgment (*judicatum solvi*), and there is no just cause why he should decline the defence, as enmity, etc., *l. filius familias* 8. § *procuratorem* 3. *ff. h. t. l. si defunctus* 15. *ff. h. t.*; because in that case the attorney is not bound by the bond of the security, which he himself did not give, but the principal for him. He, however, can be forced to a precise defence, who, when he instituted an action as a conjoined person for another, and gave security to ratify, is such reconventionally: for as he himself once thus willingly entered into the suit, and as an action begun cannot be continued to the end without a defence in reconvention, *l. servum* 33. § 3. *ff. h. t.* (3. 3.), it is not to be wondered that he himself can be compelled to defend generally (*omnino*): it is of this that *l. sed et hæc* 35. § *ult. ff. h. t. treats*; which law must, however, be thus received, that he wished to continue, generally, the action brought for another, and continue it to its end, for if he prefers to let go the action itself, he cannot be forced to a defence, *d. l. 35. § ult. versic. nisi ff. h. t.*, because this is the only penalty on a defendant not defending in reconvention, that an action will be denied to him: *l. mutus* 43. § *pæna* 4. *ff. h. t.* Certainly if an attorney who only comes in to defend a defendant himself gave security that the judgment would be fulfilled, he cannot be compelled to undertake a suit, but it will be sufficient that he fulfil that clause of the caution which refers to defending according to the discretion "of a good man" (*boni viri arbitratu*), and therefore an action can be given on the stipulation for "that which it profiteth" that the matter was not defended, *l. non cogendum* 45. *ff. h. t. l.*; *Titius* 76. *ff. h. t.*; although there was a difference of opinion on this point, as may be seen by comparing *l. mutus* 43. *l. ult. eb l. 44. ff. h. t.*; add *Pacias erant. cent. 2. num. 31.*

20. Moreover, sentence was passed against the attorney if he had contested the suit as if against the principal in the suit: *l. l. C. de sentent. et interloc.* (C. 7. 45.); compare *Groenewegen ad l. l. C. de sent. et interloc.*; although it is to be given for execution against the goods of the principal, unless the attorney have put himself forward in a suit for another, or has himself given security that the judgment shall be satisfied, or is appointed an attorney in *rem suam*, *l. si se non 4. ff. de re judicata* (D. 42. 1.); *l. si procurata meus 28. l. Plantius ait. 61. ff. h. t.*; add *Sande decis. libr. 3. tit. 7*; or, lastly, if he forsook the suit at a favourable moment, and thus was condemned in a penalty: *arg. l. qui proprio 46. § item contra 5. ff. h. t.*

21. The office of an attorney ceases on his death, according to the ordinary nature of a mandate, since there then vanishes that personal industry or purpose (*industria*) for which the attorney was selected: *l. item si adhuc 10. Instit. de mandate* (1. 3. 26.). Add the title of mandate (17. 1.). And in that case it is CUSTOMARY WITH US that he should be cited whose attorney has died in order that he may appoint another in the place of the deceased, according to the last law (§ 1.) of the *C. h. t.* (C. 2. 18.); *Merula praxi civ. libr. 4. tit. 83. cap. 6. num. 4. Groenewegen adl. ult. § 1. C. h. t.* In the same way the office of attorney is regarded as ended by the death of the principal, whether plaintiff or defendant, the matter entrusted to him being yet entire (*re integrâ*), as in the case of a mandate, but not if the thing be no longer entire: *arg. d. § 10. Instit. de mandat.* (3. 26.). And hence it has been answered by Ulpian that the attorney is to be compelled to accept the trial if the principal die before the suit has been contested, after he has given the stipulation "that the judgment will be fulfilled," for his attorney, who knew of it and did not oppose it, *l. si defunctus 15. ff. h. t.*; and it has been laid down by the Emperor Julian that an attorney can carry on an uncompleted cause and complete the dispute, even after the death of his principal, who had given the mandate to sue or defend, where the case has been "agitated" in court; that is, begun: *l. nulla dubitatio 23. C. h. t.* It is RECEIVED PRACTICE, however, in this and other countries, that when either litigant dies his heirs are cited to take up the case at the stage where it was left. As to this we shall speak more fully in the title as to trials (*post, tit. v. 1.*).

22. The office of attorney ceases also by the renunciation made by the attorney for just causes, such as deadly enmity between the principal and the attorney, adverse health, necessary journeying, absence on State service, *l. filius familias 8. § ult. et ll. seqq. l. mutus 43. § ult. l. 44. ff. h. t.* (3. 3.); also where the goods of him whom he defends are already in possession of the creditors, *d. l. 43. § ult. l. 44. ff. h. t.*, because then everything is to be administered and all suits brought by the creditors put in possession, or by the curator bonis appointed: *l. creditor 14. pr. et § 1. ff. de rebus auctorit. jud. possidendis* (D. 4. 25.). It is otherwise if the defendant has already ceased to be solvent, but his creditors are not yet

put in possession, for then the reason above given ceases. The "law" *Titius* 76. ff. h. t. is to be accepted as to this condition of facts. The opinion of *Pacius en antiop. cent. 2. num. 46.*, that in the said l. 43. § ult. ff. h. t. the opinion of *Labeo* was given, but condemned by the following law, is not at all probable, since in the said C. 45. the opinion of *Labeo* is only in so far rejected that he thought an attorney could after security sometimes be compelled to defend a defendant and receive judgment; the contrary of which *Paulus* asserts in d. l. 45., asserting with *Sabinus* that it is no part of the prætor's duty to compel him to defend.

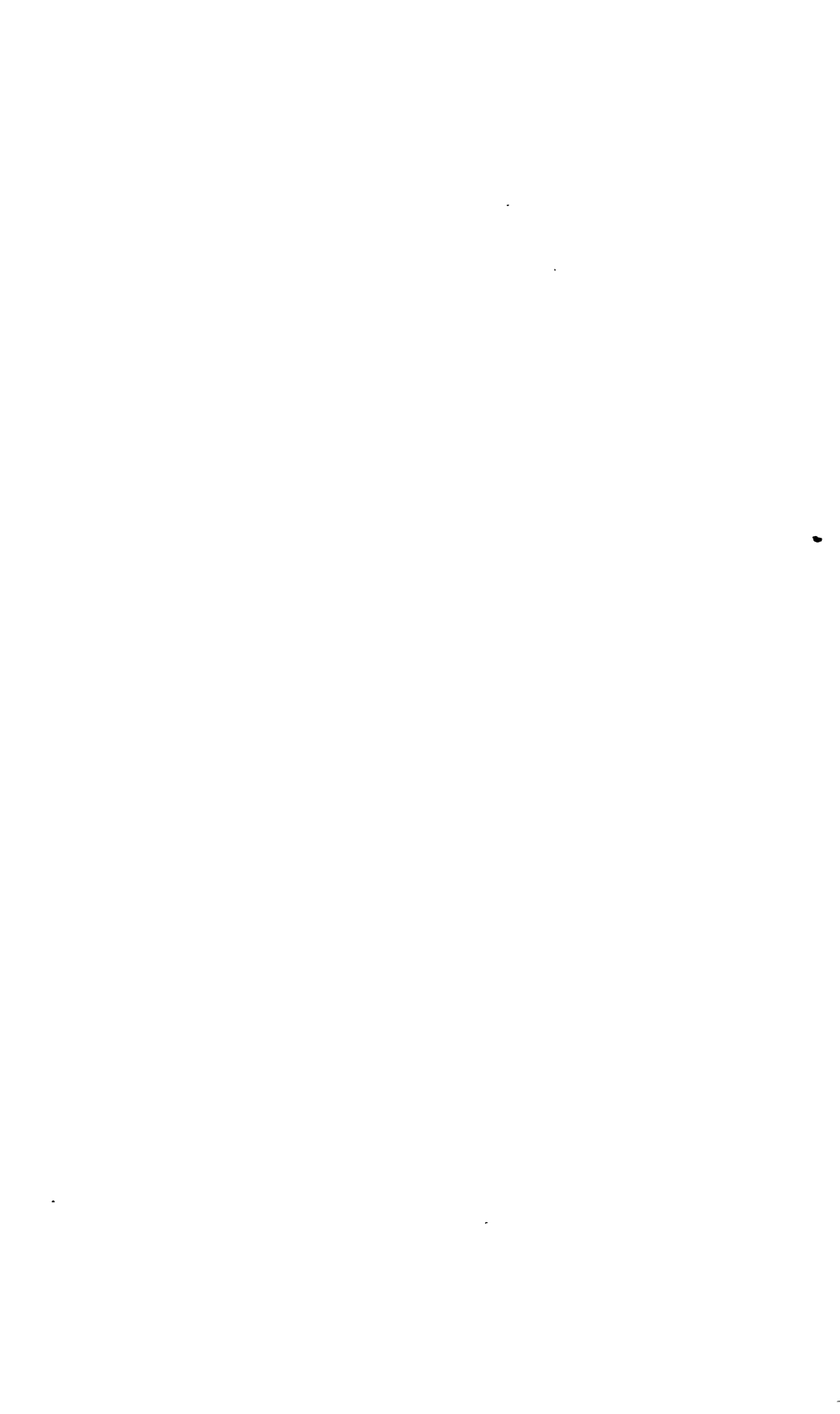
23. As regards the revocation of the mandate, there is no doubt it can be made without the consent of the adversary at any part of the trial, and that thus the office of attorney vanishes; for as the assent of the adversary is not required for the appointment of an attorney, so neither are his wishes to be consulted in the removal: *arg. § 1. Instit. de iis per quos agere poss. (1. 4. 10.)* But whether this can be done without the attorney's consent is a question. *Paulus* concedes that before contestation of suit, indeed, the principal has a free power of changing his attorney, so that he can either appoint another, or himself undertake the suit, l. ante litem 16. ff. h. t., but only on cause shown, if he has intervened as defender for an absent defendant, since perhaps it began to be to his advantage, on account of a security given, that his judgment would be paid: l. iis cuius 64. ff. h. t. But after contestation of suit it is neither lawful for the principal nor for his heir to change attorney unless there be a just cause; for as the attorney is made ruler of the suit by contestation of suit, it seemed reasonable that he should not be rashly removed from the suit, and that the dominium of the suit gained by him, as it were, should not be taken away from him without cause: l. procuratoribus 22. C. h. t. (2. 13.); l. post litem 17. ff. h. t. (3. 3.). Very many just causes, however, may be mentioned; for example, deadly enmity, sickness, journeying, age, if the attorney be suspect or related to the opponent by affinity, or is his heir, or hides away, or suffers distraint in his property in a public or private trial, or for greater cause, vide d. l. 22. C. h. t. d. l. 17. § ult. l. 18. 19. 20. 21. 22. 23. ff. h. t.; provided the principal revoking his mandate from these causes refunds to the attorney the costs incurred as to the suit, a retention in respect to which would otherwise be conceded to the plaintiff's attorney: l. quæ omnia 25. in fine; l. 26. ff. h. t.; and add the title as to pleading (ante, beginning this part). But as by our laws attorneys are not so much principals of the suit, but rather servants, it is rather to be laid down that the mandate can be recalled at any part of the trial, even if none of the above-mentioned causes be present or alleged, as, besides others, *Groenewegen* lays down, ad l. 22. 23. C. h. t. But a revocation of mandate is in no way allowed if any one has been appointed *procurator in rem suam*, d. l. quæ omnia 25. in fine, l. procuratore in rem 55. ff. h. t.; or if the principal did not wish to transfer the whole trial from the attorney, but only part of it, and to leave the rest, since

the attorney would justly recuse this inconstancy (as it must be read) of his principal: *l. in causa cognitione* 27. *ff. h. t.* But on the contrary, the principal can at any stage of the trial justly repel the "false attorney" from the suit, without giving any cause, *arg. l. licet* 24. *C. h. t.*; nay, to use the words of Ulpian, "if no mandate have been given, since nothing has been given in trial, nor have you approved that which has been done without your consent, it cannot prejudice you, and therefore the transference of such suits is not necessary to you, lest you should be burdened by another's act: *d. l. in causas* 27. *ff. h. t.*

24. But if a general power be first given to an attorney, and afterwards another special power for a certain fixed thing, and for carrying on a certain suit, it is not to be thought that by such special subsequent mandate the former general mandate is to seem to be revoked; for a special mandate does not of its own nature overturn a general mandate, nor *vice versâ*; but a special mandate is often to be added to a general mandate, since in certain cases a general mandate is not sufficient, but a special one is required. Nor, where there is a doubt, ought a change of will to be presumed, nor therefore the revocation of a mandate entered into by consent; so that he who alleges a change of will is bound to prove it, *l. cum qui* 22. *ff. de probationibus* (D. 22. 8.), which is as to many cases confirmed by *Augustinus Barbosa Azcomat. juris usu frequent.* 230. *verbo voluntas* 2. 7; but especially as to attorneys: *Menochius de præsumptior libr. 2. præsump.* 36. *Ant. Thesaurus decis.* 107. *Mantica de tacit et ambiguis convent. libr. 7. tit. 22. num.* 43. But it would have to be otherwise decided if any one on two different times had appointed two different attorneys; for by appointing the latter he would seem to have prohibited the former acting, provided he were not ignorant of such prior mandate: *l. si quis cum procuratorem* 31. § *ult. ff. h. t. cap. non injuste pen. extrade procurator.*

25. A "defender," however, differs from an attorney; being one who defends a defendant without a mandate, if he only gives security "that the judgment will be fulfilled," for no one can without security be taken to be a suitable defender of another's affair: *l. unie. C. de satisfando* (C. 2. 57.); *l. qui proprio* 46. § *qui alium* 2. *ff. h. t.* (3. 3.) § *si vero* 5. *Instit. de satisfat.* (1. 4. 11.). Sometimes he must also give security "to ratify" if he is a defender of one who is summoned for the vindication of a thing: *Pomponius* 40. § *sed et is* 2. *ff. h. t.* Nor is any one a suitable defender without mandate if he be not a major, for otherwise he and his sureties might be relieved by a "restitution of the whole," and thus the trial would be rendered illusory, as before said: *l. minor* 51. *ff. h. t.*







JOHANNES VOET,

JURISCONSULT AND PROFESSOR IN THE
UNIVERSITY OF LEYDEN,

HIS COMMENTARY ON THE PANDECTS:

WHEREIN, BESIDES THE PRINCIPLES AND THE MORE CELEBRATED
CONTROVERSIES OF THE ROMAN LAW, THE MODERN
LAW IS ALSO DISCUSSED, AND THE CHIEF
POINTS OF PRACTICE.

PART VIII.,

BEING

VOL. I. Bk. III. (TITS. IV. to VI. inclusive, pp. 217-229).

IV. On Actions by and against Corporations
(Universitates).

V. On other Affairs Conducted (Negotia-gesta).

VI. On Calumniators (Recipients of Money for Bringing
or Staying False Suits).

TRANSLATED BY

JAMES BUCHANAN,

ONE OF THE JUDGES OF THE SUPREME COURT, CAPE COLONY, AND AS SUCH, ONE OF THE JUDGES
OF THE COURT OF APPEAL; AND JUDGE PRESIDENT OF THE HIGH COURT,
GRICUALAND (KIMBERLEY).

CAPE TOWN: J. C. JUTA.

1885.



LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BOOK III. TIT. IV.

ON ACTIONS BY AND AGAINST CORPORATIONS.

SUMMARY.

1. A "universitas" is of things or of persons. A corporation of men requires several members for its institution, but may be reduced to one, who retains all its rights. It continues, though its members change. The successors are liable for judgment against predecessors, and execution goes against them.
2. Corporations have the rights of private persons and are considered as such; have their common estate, chest, &c., as the State has. Can be debtors and creditors, sue and be sued, surrender, give security, just as private persons. That is, if approved bodies and not merely tolerated, *e.g.*, Jews and Anabaptists, &c., who could not recover [Religious toleration has, of course, swept away these narrow restrictions. TRANS.]
3. If one part of an existing corporation is created a separate corporation, it is not thereby relieved from its proportional liability in the old corporation, but remains liable for its antecedent debt. For benefits cannot be given by the ruler to some, to the injury of others, nor once acquired rights taken away.
4. What the Corporation owes, its individual members do not, and *vice versâ*. Unless the Corporation bound itself individually: then its individual members can be arrested and sued, and this for the whole debt, and not proportionately. They then recover payment and damages from the corporation: the corporation must however have authority to contract; mere administrators cannot contract without consent, unless by long custom and for public benefit.
5. The causes (civil and criminal) of the "universitas" are conducted by a Syndic; who brings or defends them on the mandate of the corporation; and in order to prevent the many being called away from their business where one sufficed: in order, too, to secure the unanimous action of one and avoid the dissent of many minds.
6. No one but the Syndic can bring action for the corporation; but any one can defend it, without mandate, on giving security to satisfy the judgment, for otherwise the prætor would attain the same end by getting at the goods by mission in possession: first distraining movables, then immovables, then incorporeals, rights and credits.
7. A Syndic is created either by law, or, where the law is silent, by the individual members of the corporation, or their nominee to elect. For the form and contents of his mandate, see Wesenbech, cited in text. All who have the right of voting must be summoned to the election, even minors and women if custom gives them a vote: otherwise their curators. A quorum of two-thirds suffices, inclusive of the "actor" appointed. The majority binds the minority. No one can vote for his own position of honor or office: this was in terms.

forbidden at Rome: e.g., no prætor could appoint himself judge or tutor. Neither when he is the sole elector, nor one of many. Instances of abuse under the Canon Law, which allowed it, cited.

8. Syndics being in fact corporation-attorneys, are in very many respects similar to attorneys, in suing, defending, giving security, recovering expenses, being removed, &c. But if the Syndic executed an illegal or dishonourable mandate, he recovered no expenses: both he and the corporation are to be punished. Base mandates are not binding between principal and agent. Nor can you stand surety for crimes.
9. The duties of Syndics nowadays are more regulated by custom than aught else: and are more political than juridical, except as far as giving legal advice to the corporation head, in legal matters. A Syndic whose mandate is doubted, can scarcely appear NOWADAYS, even on giving security to ratify. A Syndic need not be a citizen of his corporation by origin: a peregrine can also be appointed.

1. A "UNIVERSITAS" is either of things, as a flock, property, (peculium), an inheritance; or of men, as a legal "college," a municipal town, a city, a village or hamlet. Although such corporations of men cannot be commenced unless by many members, *l. Neratius 85, ff. de verb. sign.* (D. 50. 16), yet if they are reduced to one person, the right of all the members seems also to have fallen back to that one, and the name of the corporation remains, *l. sicut 7, § ult. ff. h. t.* It is also to be regarded as continuing, even if all its members be changed and others are substituted for them: this is elegantly explained by Alfenus, *l. proponebatur 76, ff. de judiciis* (5. 1.) It is in accordance with this that the successor members (*successores*) are bound, and suffer execution, whenever their predecessors were condemned in the name of the corporation. *Neostadius Curie supr. decia. 123, Anton. Faber Cod. libr. 4. tit. 7. defin. 5, fere in pr.*

2. Corporations, however, often use the rights of private persons, and are viewed as being in the position of private persons, *l. bona civitatis 15, l. 16. ff. de verb. sign.* (D. 50. 16.). So that they are, on the analogy of the State, said even to have their own proper estate, a common chest, things in common, *l. 1, § 1. ff. h. t.* (3. 4.). Hence they can be both debtors and creditors: and themselves sue and be sued in private actions, actions to regulate boundaries, to divide inheritance, and an almost boundless number of other actions. They must also suffer surrender of their common goods, if they are not defended: can demand security, according to circumstances, or furnish securities demanded: *l. 1, § 2, l. 7. l. 9, 10. ff. h. t.* But those corporations which are tolerated indeed, but not approved, have not this right of appearing in Court, or possessing estate: such are the Anabaptists and other sects: also the Jews, to whom therefore, if anything be legated it is not due: *l. 1. C. de Judæis* (1. 9.); *arg. l. cum. senatus 20 ff. de rebus dubiis* (D. 34. 5.) and that the administration of law and justice is, WITH US, denied to them, when they wish to recover what was left to them, is laid down by Jac. Coren *observ. 9, arg. tit. ff. de colleg. et corpor.* (D. 47. 22.): *l. con-renticula 15. C. de episc. et cleric.* (C. 1. 3.) [With the progress of religious toleration this has naturally become obsolete. TR.]

3. If a corporation consisting of several joint villages have contracted a debt, and the ruler, thereafter separating any one village from the corporation, consider that it (the separated village) shall be armed with the privilege of a special or new corporation : it must, nevertheless, NOT BE THOUGHT that that part of the old corporation, thus enlarged by a new right, or separated, shall also be, by that very fact, relieved from the burden of debt previously contracted, and paying for it proportionately : for the ruler is not wont to bestow benefits to the injury of another : *l. nec avus. 4 C. de emancipatione liberorum* (8. 49.) Nor can he take away the right of proceeding for a share against that part of the old corporation, a right once accrued to the creditor : *l. ult. in med. Instit. de his qui sui vel. alieni sunt.* (I. 1. 8.) : and this *Neostadius Curisæ supr. decis. 10*, says has been decided in a certain leading case.

4. What the corporation owes, its individual or single members do not owe ; and what is owing to the corporation, is not owing to its individual members, as Ulpian laid down : *l. sicut 7, § si quid 1. ff. h. t. Carpzovius defin. forens. part 2, constit. 6, defin. 24. Grotius de jure belli. ac pacis libr. 3. cap. 2, num. 1.* Unless the corporation nominately bound itself and its individual members for the debt ; in which case it is RECEIVED PRACTICE (*receptum est*) that the individual members can be summoned for the debt of the corporation just as individual citizens can, and their individual goods can be burdened with arrests, or detention, for recovering payment of such debt : *Christinæus ad Mechlinienses tit. 1. art. 43. in notis num. 1. Peckius de jure sistendi, cap. 4. num. 17. Dutch Consultations, part 2. cons. 84. Groenewegen ad d. l. 7. ff. h. t.* Nor can they only be summoned each for his share, but IT IS MORE CORRECT TO SAY that they can in that case be singly summoned for the whole debt : they recovering from the corporation, not only what they have spent, but also the amount of damage they have thus suffered. *Peckius et Christinæus d. locis. Judgements of the High and Provincial Courts, decis. 71*, both because it would be unjust that the creditor of the corporation should have to proceed against so many debtors, and that a particular and piecemeal payment should be made to him, according to the number of the many citizens who altogether, and at the same time, and reckoned as one, pledged their credit for the whole corporation : *arg. l. tutor 41, § Lucius 1. ff. de usuris* (D. 22. 1.) and also because, in the case in which the corporation simply is the debtor, and the individual citizens are not singly bound nominately, they yet are in a certain manner bound proportionately in as far as they proportionately are bound to contribute, on account of the straits and indigence of the corporation, in order that its debts may be paid. This is what Seneca said of old, influenced thereto by natural reason : "I," he said, "will owe it to him, not as if it were my own, but, in a way, as one of the people ; I will not pay as for myself, but I shall contribute it as it were for the country" ; and individuals will owe it, not as their own, but as a part of the public, *libr. 6. de beneficiis cap. 19.* If, therefore, a greater obligation on individual

citizens had been entered into, it would be inept, and the individuals would not be further bound than if no such form of obligation had been added: *Carpzovius* differs in vain: *defin. forens. part 2. constit. 6. defin. 26.* in his argument on *l. reos promittendi 11, § ult. ff. de duobus reis constituendis* (D. 8. 40.). For he does not treat there of those who are collectively (as they say) bound, nor of a creditor who had the right of exacting the whole debt, as it is in our case, in which, as the corporation owed as a whole, so also its individual members, it must be presumed, according to what has been already said, were bound in the same way, unless it were otherwise stipulated. All this so obtains, provided those who contracted in the name of the corporation had its authority to pledge the individual citizens and their goods: which (authority) is then beyond doubt, if the individual members have nominately consented to bind themselves and their things for the debt of the corporation: *Zoenius tit. ff. de rebus creditis, num. 45. Carpzovius defin. forens. part 2. constit. 6. defin. 25*; thus such right of obligation *And. Gayl. de arrestis imperii cap. 9. num. 8*, contends, not without reason, should be denied to those who are only the administrators of corporations, wherever the assent of the individual members does not appear; because to bind individual persons often does not concern the public utility; nor has the ruler, nor the magistrate, nor the State, any right beyond that of the public utility, over the goods of individual persons, much less so have the administrators of corporations, unless it is manifest that by inveterate custom, the citizens not contradicting it, such power of pledging had been acquired by the administrator of the corporation. But if there appear to be a manifest public utility in thus binding individual citizens, there is no doubt that the ruler can, by right of his supremacy, render the persons and goods of individuals liable for the debt of the corporation. It is on the basis of this ground of utility that citizens and inhabitants and their goods can be arrested and distrained for tributes imposed on a State, a town, a village, and not paid on the due date. *Placaat of the Courts of Holland, ult. Martii, 1588*, after this had already been previously laid down by the decree of Count Lycestr. Holl. Gubernator, 21 March, 1586. Add title on *reb. cred.* (Post, Tit. 12. 1.)

5. For the carrying on the causes of the corporation it has been the custom to appoint a Syndic to it, *l. item 6, § si decuriones 1. in fine, ff. h. t. l. munerum civilium 18, § defensores 13. ff. de munerib. et honoribus* (D. 50. 4.) he is also called the plaintiff (actor) of the corporation, *l. nec civitatis 74, ff. de procurator.* (D. 2. 3.) *l. item 6, § 2. 3. ff. h. t.* sometimes "eclicus," a public attorney or prosecutor, *l. sancimus, 30 C. de episcop. audient.* (C. 1. 4.) or a "defender," *l. munerum civilium 18, § defensores 13. ff. de muner. et honorib.* (50. 4.) or the attorney of the corporation, especially if he is plaintiff for a monastery, *nov. 123 cap. 27.* Such are also called "apocrisarii" *nov. 123, cap. 25. novell. 6. cap. 2.* and "responsarii" *d. nov. 123, cap. 42, nov. 133 cap. 5.* Nor does he only intervene in civil but

also in criminal cases, whenever a crime is committed on a corporation; for although an attorney is only admitted to appear for private persons, in crimes, subject to certain distinctions laid down in the preceding title, yet as a corporation is only a "feigned person" (*ficta tantum persona*) and cannot defend itself, a syndic was necessarily to be heard for it in case of crime, *Wesembecius para tit. ff. h. t. n. 6*. A syndic is therefore one who brings or defends the case of a corporation, on the mandate of the corporation: he is sometimes distinguished from an actor, because an actor was appointed for a certain cause, whereas a syndic had control over the conduct of the whole affairs of the corporation, *arg. d. l. item 6, § 1. 2. ff. h. t.*, although syndics were so called among the Greeks in another sense, since they were chosen by the people to advise as to laws; as we are told by *Car. Sigonius de republica Atheniensium, lib. 4. cap. 6. fere in princip.* It was to the advantage of the corporation that these "actors" or "syndics" should be appointed, for it seemed superfluous and useless that many persons should be taken away from their own business for the common cause of the corporation, for the conduct whereof one was sufficient. So that of old, when it was not yet allowable to appear judicially in another's name, it was yet allowable to do so for a corporation *pr. Instit. de iis per quos. agere poss. (D. 2. 10.)*, both because the corporation itself only bore the form of a person, so that it could not, in the way of nature, give consent *l. § 1, ff. de libertis universitatis*, and so could neither naturally bring action for itself, nor defend, and thus needed the intervention of an actor or syndic, *arg. d. l. 1, § 1, § ult. ff. de acquir. vel amitt. poss. (D. 41. 2.)* and because, lastly, the business of the corporation would be bothered with perpetual dissent if its transactions had to be carried on by all its members, since the nature of men is prone to dissent, and often there are as many varying feelings as there are persons, *arg. l. quia poterat 4. ff. ad Senatus C. Trebell. (D. 36. 1.)*

6. No other than the actor of a corporation can proceed in the name of the corporation so as to commence an action *l. nulli 3. ff. h. t.* although any one can without mandate defend a corporation, provided he give security to satisfy the judgment: because otherwise the prætor would put someone in possession of the goods of the body which is not defended and would in the end order these goods to come *l. 1. pen. et ult. ff. h. t.* So that in the first place the moveables of the corporation would be distrained, then the immovables, and when these failed, or were not sufficient, then the "incorporeals" of the university, its rights and credits, would also be distrained, in like way as is established with regard to private debtors. *l. in civitates 8. ff. h. t.; l. Divo Pio 15, § in venditione 2. ff. de re judicata (D. 42. 1.)*

7. A syndic is created either by law, when the municipal law fixes a certain "order," as for example that the seniors or juniors in the order of the decurions should manage the corporation cases, *l. nulli 3. ff. h. t.* in the same manner in which an order is prescribed in undertaking

embassies *l. sciendum* 4, § *ordine* 5. *ff. delegation.* (D. 50. 7.) or, the law ceasing, by the order of decurions, if such an order presided over the corporation, *d. l. 3. ff. h. t.* or, again, that they should be managed by individual members of the corporation or municipal towns, *arg. l. si municipes* 2. *ff. h. t.*, or by him to whom the whole order or the municipal members gave the power of choosing. Since he is also regarded as elected by all the members who is appointed by him to whom the order entrusted the duty of electing, *l. item* 6, § *si. decuriones* 1. *ff. h. t. cap. cum in veteri* 52. *extra de electione et electi potest.* In what form the instrument of mandate in which the syndic is appointed is to be written, and what must be expressed and had regard to in it, *See Wesembecius paratit. ff. h. t. num. 7.* Again, whenever an actor is to be appointed, it is indeed necessary that all who have the right of suffrage should be called together, *arg. l. observare* 2. *C. de decurion.* (C. 10. 31.) even if they are minors, or women, whenever custom has conceded to these the power of voting, otherwise the curators of minors: but it was not necessary that all should be present, since it was sufficient that two thirds of the whole order should be present, including also him who is appointed "actor" by the decree, *l. nulli* 3. *l. 4. ff. h. t. l. illa decreta* 2. *l. 3. ff. de decretis ab ordine faciend. l. nominationem* 46. *C. de decurion.* (C. 10. 31). Nor was it necessary that all present should consent, since what the majority of those present consented to, all are supposed to have decreed, the majority binding the minority *l. quod major* 19. *ff. ad municipalem* (D. 50. 1.), *l. item si unus* 17, § *ult. ff. de receptis qui arbit. recep.* (D. 4. 8.) And in such a case the vote of the father was allowed by law to benefit his son, and *vice versa*, although the son was in his father's power, because the father does not thus act as a member of the family but as a decurion, unless the municipal law, or a perpetual custom, prohibits, *l. illud* 5. *l. 6. ff. h. t.* But the Roman law never allowed any one's own vote to benefit himself in obtaining an honor or an office, either as regarded this office of a syndic, or as to any kind of honor or office, but rather forbade, in express words, that the prætor or the præses should appoint himself a special judge or a tutor *l. ult. ff. de offic. prætoris* (D. 1. 14.) *l. præses* 5. *ff. de officio præsidis.* (D. 1. 18.) *l. prætor.* 4. *ff. de tutor. et cur. dat. ab his* (D. 26. 5.) And it is vain that some concede, that in those cases in which the election is in the hands of one alone, his own vote is useless on the ground that the cited "laws" seem to refer to these cases: while they give effect to one's own vote when the election depends on the votes of many. For as that distinction is not found established by any "law" or legal argument, it is not to be received: especially so, because not only are the traces of a self obtrusion and of a shameless ambition apparent in both these cases, but such a strong striving for public office is not without suspicion. Paulus certainly does not accord any force to one's own vote in *l. plane* 4. *ff. h. t.* For he says that he who is decreed to be syndic is not to be so counted that he can be said to be elected by the majority of

votes, but is only counted for the purpose of saying that two-thirds are present: if that number is not present you go fruitlessly to the vote. For when it was laid down by the canon law, by the rescript of Innocent the Third, that in an equal division of votes he who had the right of voting could by his own assent secure his own preference over an extraneous competitor *cap. cum. in jure* 33. *extra de electione et electi potest.* why, I pray, is it surprising that on one occasion, where there were seven electors, Maximilian II. and Ferdinand II. were chosen, by their own votes, to the dignity of Emperor, and what wonder if, under the authority of that pontifical law, there was in many places found to be an approved license of this fawning exercise of one's own vote.

8. As a syndic is said, in dealing with the affairs of a corporation, to discharge the duties of an attorney, *l. item* 6, § *ult. ff. h. t.*, the consequence is, that in many respects we may say the same is found received, as to him, as we have laid down obtains as to attorneys of private persons, especially as corporations are regarded in the light of private persons, *l. eum qui vectigal* 16. *ff. de verbor. significat.* (D. 50. 16). Hence he can be removed if he is unsuitable, or if there be other just cause, the mandate being then revoked by those by whom it was given: he must also give security to ratify if there be a doubt as to the mandate, he is also compelled to defend the corporation, when it is sued or has claim made against it in reconvention, *d. l. 6*, § *ult. ff. h. t.*, and although he is not bound to give security to ratify when he is clothed with a mandate, yet it DOES NOT SEEM to be doubted that if he is a "defensor," he ought to interpose security as to fulfilling the judgment: for never is anyone, according to an olden rule, understood to be the suitable defender of another's things without giving security, § *si vero reus*, 5. *Instit. de satisdat.* (I. 1. 24). And as a private person's attorney can recover expenses and damages, so also reason dictates that the syndic should be kept indemnified, if he have spent anything out of his own pocket: being spent for the common advantage of the corporation, it should not burden the syndic, but the corporation itself, whom he represents: in the same way as is the case not only with attorneys, but tutors, curators, and the like, as is the received practice according to very well-known principles of law. *Jac. Coren observ.* 3. num. 16. *et seqq.* Unless he was carrying out an illegal mandate granted by a corporation: for then, as the corporation itself, which thus offended in appointing him, is to be punished, *l. metum autem* 9, § *animadvertendum* 1. *ff. quod metus causa* (D. 4. 2.); *arg. l. si usufructus*, 21. *ff. quib. mod. usufr. amitt.* (D. 7. 4.) *l. semper adversus* 15, § *si in sepulchro*, 2. *ff. quod vi aut clam.* (D. 43. 24.); so also is the syndic-mandatarary to be punished, for he ought not to be the executor of an illegal mandate: nor, if he has suffered any punishment himself, is any recourse to be given him, against the corporation, for an indemnity, even if the corporation had promised him this indemnity, both lest he should otherwise be invited to do wrong, trusting to his doing so with impunity, contrary to

the dictates of right, and also because the mandate of a base thing, (*rei turpis*), interposed against good morals, is not binding between principal and agent, § *illud quoque* 7. *Instit. de mandato* (D. 17. 1.); and it is generally laid down, that a surety for crimes cannot be accepted, *l. si a sec.* 70, § *ult. ff. de fidejussoribus*, (D. 46. 1).

9. But what the duties of syndics are NOWADAYS,—consisting as they do more now in carrying out, and arranging the political, more than the legal affairs of a state, or at most in suggesting salutary advice to the head of the corporation in regard to the litigious business of the corporation,—is to be ascertained more by custom than by any certain rules or precepts: this being alone to be observed, that an “actor” will scarcely seem nowadays to be heard on behalf of a corporation, if there is a doubt as to his mandate, even if he interposes security to ratify. *Groenewegen, ad. l. 6. ff. h. t.*: and that it is not necessary that a syndico be an original citizen of his own state, for even a peregrine can be appointed, as experience shows, and as *Wesembecius* annotates in *paratit. ff. h. t. num. 5*.

TITLE V.

ON AFFAIRS CONDUCTED (*Negotiis Gestis*.)

SUMMARY.

1. A "manager of affairs," (*negotiorum gestor*) is one who carries on the business of one who is absent or who does not know thereof. Generally it is culpable to meddle with another's affairs unauthorisedly. Not so here, for the advantage is not personal. It is of general utility to carry on the business of those suddenly called away to foreign parts without opportunity of leaving a mandate behind. No one would attend to such affairs unless he had an action for expenses. He is also rightly liable for his management. The business affairs of one conceived, but not yet born, can thus be carried on: of one captured in war; mad or an infant; or dead, and his estate lying vacant.
2. The direct *negotio-gestate* action competes to the owner or any one having an interest: against the person acting without his mandate, even if there be the mandate of a third person: against the person so carrying on such affairs, even a woman, for she could act extrajudicially, and be an institor. A minor thus acting could be sued in as far as he became the richer. If many carried on, each individually liable for share, only.
3. The object of the action is to get accounts rendered of the administration carried on, and to recover capital, interest and profit from the *gestor* (carrier-on): nay, even what he had unjustly recovered, or recovered although not due. The *gestor* must make good his own fault (*culpa*), even the slightest. If he converts monies to own use, is liable for highest interest. Delay (*mora*) it is true, usually only carries ordinary interest; but here there is fraud. An attorney so converting monies is only liable for ordinary interest, for he at all events had some mandate, the *gestor* has none. The *gestor* is only liable for ordinary interest, if he openly lends to himself and "enters it up." If he lent "recovered monies" on interest, he must return some interest, and take risk of credits for unsuitable investments. If he allows money to lie idle, he pays ordinary interest: unless the owner used to keep his monies idle: or, unless the *gestor* had some just cause for keeping the recovered monies with him, for "owner's" advantages.
4. The *gestor* is, as a rule, liable for the slightest fault (*culpa levissima*). Voet argues this out by reference to particular passages, especially where Ulpian in this respect puts *negotio-gestate*, on the same footing as sale, pledge, guardianship, commodate. In most of such cases (save the last) the advantage is mutual, therefore fraud and fault must be made good. "Exact diligence" being required, and not only such as one is wont to use in one's own affairs if another could have shown more. A mandatory is liable for slightest fault, why not a *negotiorum-gestor*. Besides, it is the voluntary acting founds the slightest blame: as a voluntary taking of deposit would, although, as a rule, a depositary is only liable for

the higher degrees of blame. So with voluntary guardianship. Nor does the argument that to exact highest diligence would lead to neglect of absentee's affairs hold, for experience shows that in mandate no such difficulty is found, why then here? In some cases a *gestor* is only liable for fraud and gross negligence, e.g., carrying on affairs already neglected, or saving from ruin and deterioration, or where praetor appoints, or where *gestor's* successors complete what had been begun. Some think that NOWADAYS, the degree of responsibility may be left to the judge to fix, according to each case's circumstances.

5. The *gestor* is not bound for fortuitous accident, nor for the risk of money-credits given, unless he has been negligent. Or unless he have embarked on a new kind of business: or lent money the owner had always allowed to be idle. If benefit accrues, it is the absentee's: if loss, the *gestor's*, unless there should be a balancing of part profit, part loss, over many ventures. *Gestor* makes good accident to recovered monies unpaid over, and loss of. Also, if undertook the *gestion* for his own, and not absentee's benefit. And in a few other cases.
6. The *gestor* is liable for affairs he ought to have managed, but neglected. He should finish what he has begun. He is not bound to begin new things, unless another *gestor* would have; or unless it is connected with what he did do; or he undertook everything. If himself a creditor of the absentee, he is bound, out of the money he recovers, to pay himself as well as other creditors. If a debtor, he must recover from himself, or be liable to penalties named.
7. Whether the *gestor* can force the other debtors of the absentee to pay up by judicial proceeding, is a MOOT POINT. The more correct view, Voet says, is no: for the reasons he gives, that the debtor is only bound to his creditor, who may not ratify the payment to another: nor can anyone without mandate sue, unless he were a conjoined person. The *gestor's* extrajudicial interpellation of the debtor had the effect of founding *mora* and its penalties. But NOWADAYS it is not of much pecuniary good.
8. The "contrary" action is that of the *gestor* and his heirs against the party whose affairs were managed. If he were a ward, action is rather against the tutor, unless the ward were, on contestation of suit, the richer: or the ward becomes the heir to the estate managed. It is brought for the *gestor's* indemnification, and for recovery of expenses and protection against loss: or for extinction of pledges made, personal or real: for cession of action, security against future loss: especially for necessary and useful expenses: interest. NOWADAYS interest on advances is not from date of advance, but of contestation of suit.
9. The *gestor* recovers expenses, although they have ceased to be useful. The beginning, not the end of the transaction is viewed. He who managed another's business for his own, and not the owner's gain, can only recover what the owner was thereby made the richer. Nor can a *gestor* recover more than he should rightly have expended. One who acts in fraud cannot recover to indemnify himself.
10. This contrary action ceases, if, regard being had to the beginning of the transaction, no advantage accrues to the owner: examples given in text: unless the owner ratifies.
11. It also ceases if the affairs have been managed of an unwilling person, or one prohibiting it. But NOWADAYS it is considered that one should not be richer to another's loss, and repetition is allowed of as much as the owner was by such management the richer: on the example of a *mala fide* possessor recovering expenses. Unless a third person was ready to give from his own funds: or for pious reasons, with no intention to recover, which non-intention is presumed in the cases mentioned in the text. Unless even in these cases an express intention to recover is shown: or the *gestor* have goods of the other in his possession, then the presumption is, it was on that other's account.

12. There need not be an intention to carry on the affairs of a particular person: it is enough if there is the intention to carry on *someone's*. If you think you are carrying on Titius' business, whereas it is Mævius', Mævius is bound. Titius is even bound, if he ratifies as his own. If the *gestor* wrongly thinks he was acting on the obligation of some office, or of a mandate, still the action lies.
13. If you carry on another's business not as another's, but as your own, it is a point of controversy whether the negotio-gestate action lies. You would rather have the recovery of what was undue from him to whom you paid, than this action against him whose affairs you conducted. For your payment does not free the real debtor. Passages looking the other way explained.
14. If the owner ratify the gestion, the negotio-gestate action remains still. The ratification strengthens matters, so as to equal a mandate. VOET THINKS intention of parties should rule. If the intention of the ratification was to give rise to the action of mandate, that lies: if not, the original negotio-gestate action is the proper one.

1. He is a "manager of affairs" (*negotiorum gestor*), who, without mandate, carried on the business of an absent person, or of a person not knowing of it, *l. qui servum*, 41 ff. h. t. (D. 3. 5.); sometimes, although improperly, he is called an "attorney," *l. si quis offerenti* 58 ff. de solution. (D. 46. 3.), and a "voluntary procurator" by Cicero in *Bruto. cap. 15. pag. mihi*. 296. And although it is commonly accounted "a fault" (*culpa*) to mix oneself up with things not belonging to one: *l. culpa est* 36 ff. de reg. jur. (D. 50. 17.) *l. idem juris*. 8, § 1. ff. ad leg. Aquit. (D. 9. 2.) yet it is not "a fault" if any one carries on the affairs of another, not for his own benefit and utility, but for that of the owner (*dominus*) so much so that it may be said to be RECEIVED PRACTICE, for the sake of utility, that those persons whose affairs are thus managed are thereby bound, even if they are ignorant of it, lest otherwise the business affairs should be delayed of those who are absent, forced thereto by a sudden haste (*subita festinatione*), and have left for foreign parts without having committed to anyone the administration of their affairs, for no one, assuredly, would look after such affairs if he had no recourse by action for what he had spent: § 1. *Instit. de oblig. ex quasi contractu* (I. 3. 27.) *l. si quis absentis* 5 ff. de oblig. et act. (D. 44. 7.) For this reason an action "negotiorum gestorum" has been introduced, not only the "direct" but the "contrary" also, and deservedly so. § 1. *Instit. de obligation. ex quasi contractu* (I. 3. 27.) whoever's affairs were so administered, whether of a person not yet born, but only as yet in the womb, *l. cum pater* 29 ff. h. t. or captured by the enemy, *l. successor* 12. *l. atquin* 19, § ult. *l.* 20. ff. h. t. or a madman or infant: *l. ait prætor* 3, § et si furiosi 5. *l. si pupilli* 6 ff. h. t. *l. contra* 2, C. h. t. *l. furiosus*, 46. ff. de oblig. et act. (D. 44. 7.) or of one already dead, and thus the estate lying vacant, *l. ait prætor* 3. pr. et § hæc verba, 6. *l. successor* 12, § 1. *l. num. et Servius* 21, § qui negotia 1. ff. h. t.

2. The "direct" action "negotiorum gestorum" is personal and

bonæ-fidei, § 28. *Instit. de act.* (I. 4. 6.); on a quasi contract* § 1, *Instit. de oblig. ex quasi contractu* (I. 3. 27.): a civil law action, both because it is nowhere said to have been introduced by the prætor, nor does there anywhere occur in our law a prætorian action which is *bonæ-fide*; such however this *actio negotiorum gestorum* is. For although Ulpian in l. 3 in *pr.* says, "The prætor says," &c. "I will grant a trial in that respect," and that that was a "necessary edict," l. 1. *ff. h. t.* it does not thence follow that it owes its origin to a prætorian edict, for in the same way in l. 1. *pr. ff. commodati* (D. 13. 6.) the same Ulpian says, "the prætor says, 'If any one shall be said to have given by way of commodatum, I will on that ground grant a trial'": yet there is no doubt that the commodate action is a civil law action, l. in *commodato* 17, § *sicut* 3. *ff. commodati* (D. 13. 6.) The same may be said of suretyships of married women forbidden by the S. O. Vellejanum, and yet declared by perpetual interdict, as can be seen by l. *cum ad eas*. 19 *C. de Senatus Vell.* (C. 4. 29.) The action is open to the owner whose affairs have been carried on, or to him to whose interest it is that the case should be brought l. *actio*. 47. *pr. ff. h. t.*; against him who carried on such affairs, without plaintiff's mandate, even if there was a mandate of a stranger or some third person. For which reason, if anyone received from another money or anything else which was to be conveyed to me, inasmuch as he carried on my affairs, the "negotio-gestate" action competes to me against him, l. *si pupilli* 6, § *si quis pecuniam*, 2 *ff. h. t.* The action is also given against him who mandated that another's affairs should be so conducted l. *nam. et Servius* 21, § *ult. ff. h. t.* Nor does it matter of what sex he or she was who conducted them: because a woman can carry on extra-judicial business, in the same way in which it obtained that she could be an *institor*, l. *ait prætor* 3, § 1. l. *liberti* 31, § *pen. l. heres viri* 33. *ff. h. t.* joined to l. *sed et si* § 1 l. 8. *ff. de instit. act.* (D. 14. 3.) A ward carrying on the affairs of another after the Constitution of Antoninus Pius can be summoned in so far as he has been thereby made richer, as is shown by l. *ait prætor* 3, § *Pupillus* 3. *ff. h. t.* If many persons have conducted other's affairs, the action is given against each one individually, only for his share. l. *cum alicui* 26. *ff. h. t. arg. l. Lucius Titius* 46, § *Sempronii* 1. *ff. de administrat. et peric. tutor.* (D. 26. 7.)

3. The object of this action is to make the party carrying on the affairs render accounts of his administration, § 1. *Instit. de oblig. ex quasi contractu*: *arg. l. qui proprio* 46, § *procurator* 4. *ff. de procurator.* (D. 3. 3.), and to restore all that had accrued to him out of the administration, whether it be capital, or interest, or any other gain: *arg. l. si negotia* 11. l. *atquin.* 19, § *pen. ff. h. t. l. idemque* 10, § *si procurator* 3. *ff. mandati* (D. 17. 1.) even if he had, as *gestor* for another, received more than was just or even that which was undue: l. *si autem* 8, § *item*

* Sandars p. 477, 2nd Ed. of his Institutes says "the exact translation of quasi ex contractu t. neri videntur would be 'seem to be bound by a tie analogous to that by which persons are bound under contracts'" but rightly adds that "as this is too long a phrase to repeat every time the words quasi ex contractu occur, the Latin has been retained in the translation:" "on a quasi-contract," seems to me as short.—Tx.

si 1. l. si quis negotia 23 ff. h. t. (D. 3. 5.) That also which did not accrue, owing to his own fault. Thus the heaviest interest would be recovered if he converted his principal's monies to his own use. For although in equitable proceedings (*bonæ-fidei iudiciis*), the heaviest interest is not wont to be awarded on account of delay (*mora*) but only that interest given by the custom of the country, and therefore the common rate of interest, yet the return of the highest interest obtains in the above case, by virtue of an exceptional law, on account of the exceeding roguery (*malitia*) and fraud of the *gestor*, possessing his principal's money contrary to his will, *l. qui sine usuris 38 ff. h. t.*: therefore no opposing argument can be drawn from the case of an attorney who, when he converts the monies of his principal to his own use, returns only the ordinary interest and not the greatest, *l. idemque 10, § si procurator, 3. mandati*, for an attorney who originally began to possess monies on the mandate, and with the will of his principal, and thereafter converts them to his own use, seems to offend less than the *gestor*, who from the beginning obtained the money without the will of the principal, *arg. d. l. 38, in fine ff. h. t.* Nor from the case where the *gestor* is only bound to return common interest, when he had not demanded from himself the money lent to himself without interest by a person whose affairs he afterwards began to carry on: as is laid down in *l. si pupillo 6, § ult. in fine, ff. h. t.*, because it would be enough to get interest out of a debt not bearing interest. Wherefore also it would not be fair that he should be bound to restore more than ordinary interest, when he did not secretly convert the money to his own uses, and secretly procure an advantage for himself, but openly entered it to himself, he himself, as it were, collocating to himself on interest his principal's money, and binding himself to his principal for money received on loan, *arg. l. quoties 9, § non tantum, 7. l. non existimo, 54. ff. de adm. et peric. tut.* (D. 26. 7.). If the *gestor* lent recovered monies on interest, he is not only bound to restore the interest which he demanded, but the risk of the credits (*nominum periculum*) attaches to him, wherever any blame is discovered in him for lending the money to a less suitable person, *l. litis contestatio, 37, § 1. ff. h. t.* But if he neither lent the money on interest, nor converted it to his own uses, but only kept the monies lying idle (*pecunias otiosas*), he is merely bound to restore ordinary interest, *d. l. at quin 19, § pen. l. liberto, 31, §. qui aliena, 3, ff. h. t.*, unless it were the custom of the principal to keep his monies lying idle by him, in which case the *gestor*, who asserts that he kept such monies deposited with him, would not render anything by way of interest, *l. qui semisses, 13, § ult. ff. de usuris, (D. 22. 1.)*, or unless there were a just underlying cause for which the *gestor* placed recovered monies apart with himself: as if there were a danger that the estates would be committed to the public, or that the risk of money lent on bottomry would be increased, or that there should be an entrusting to compromise, *l. debitor, 13. ff. h. t.* (D. 3. 4.)

4. As to "blame" (*culpa*), the *gestor* is responsible for the lightest degree of blame as a rule: this both clear legal phraseology and legal analogy dictate. For thus it is said, in *l. si mater*, 24. *C. de usuris*, (C. 4. 32.), he must render all diligence. And in *l. contractus, quidem*, 23. *ff. de reg. jur.* (D. 50. 16.), when Ulpian had mentioned various contracts in which, besides fraud and gross fault, even light fault was to be made good, as in the case of sale, pledge, guardianship, and others, he at length adds "*negotia gesta*," adding these emphatic words "in these cases" (here he placed "*negotia gesta*" in the last place), "diligence" is exacted. By which word "diligence" he could not mean to designate other than the absence of the slightest fault, for he had just before treated of *culpa lata*, and *culpa levis*. And, to remove doubt with anyone, the same Ulpian uses the same mode of speaking as to a "commodate," as to which all agree that the lightest blame is to be made good. Thus see, *l. si ut certo* 5, § *nunc videndum*, 2. *ff. commodati*, (13. 6.); where it is said, "but where there is an advantage on both sides, as in purchase, &c., both fraud and fault are made good." A "commodate," however, often only embraces the advantage of him to whom the thing is commodated, and therefore the opinion is the more correct one of Quintus Mutius, who thinks that both "fault," and "diligence" are to be made good. Not to mention that Justinian also followed the example of Ulpian, and pronounced the same opinion as to the liability for "fault," in respect of commodate, and "*negotio gestate*." (Cites I., 3. 14, § 2. in *med.* and I. 3. 27, § 1., in both texts of which it is laid down, that "exact diligence" is required, and not only such as one is wont to use in one's own affairs, if another's diligence would have been greater.) And certainly if a mandatory can be sued for the lightest fault, *l. a procuratore*, 13. *l. in re mandatâ*, 21. *C. mandati* (C. 4. 35.), I DO NOT SEE ANY REASON why he also who had voluntarily taken upon himself the administration of others' affairs, should not also be responsible for the lightest fault: especially where it is otherwise clear that they who, by the nature of the contract, were only bound for *culpa lata* and *culpa levis*, if, yet, they put themselves forward voluntarily, were liable also for the lightest fault. A depositary is only liable for fraud, and the "greatest blame," *d. l. 23. ff. de reg. jur.* (50. 16.) *d. l. 5*, § 2. *ff. commodati*, § 3. *Instit. quib. mod. re contrah. oblig.* (I. 3. 27.); but if he have put himself forward voluntarily, he is liable for the "lightest blame," *l. 1*, § *sæpe evenit*, 55. *ff. depositi*, (D. 16. 3.). A guardian is commonly bound for "light fault," but for the lightest if, on security given, he alone has undertaken the administration, *l. qui injuriæ*, 53, § *qui alienis*, 3. *ff. de furtis*. (D. 47. 2.); that there is no mention in *l. tutori*, 20. *C. h. t.* (C. 2. 19.), of anything except *culpa lata* and *culpa levis*, in no way subverts our view; for that law does not speak determinately, but merely is less full, and must be amplified by other laws which define more fully, and as above cited. Nor is our view disturbed by the rescript of the emperors in *l. quic. quid* 7. *C.*

arbitrium tutelæ (C. 5. 51.). For there are not found in that passage any "restrictive sentences" (*particula laxativa*), as they say, excluding the making good of "lightest blame;" and if we look at it very carefully there is something singular in this *negotio-gestate* action, which is brought for the administration of a charge, not merely voluntarily undertaken, but even devolved on an unwilling person; and by parity of reasoning it has seemed that it ought to stand on the same footing as an action of guardianship, and to be of the same force as it. Without force is the reasoning which says, that to exact a liability for the lightest fault in those carrying on the affairs of others would entail the neglect, oftentimes, of the affairs of absent persons, to the signal public or private disadvantage. For that that is not true the contract of mandate abundantly shows: for although the lightest fault is to be there made good, *d. l. 13. et 21. C. mandati* (C. 4. 35.), there are not wanting those who, on mandate, undertake the care of others' affairs: that feeling of friendship, from which mandate derives its origin, impelling the mandatary to undertake such things on the mandate, *arg. l. 1, § ult. ff. mandati*, (D. 17. 1.); which (things) in the same way, where a mandate is wanting, a friend will freely conduct, voluntarily moved thereto by the same reason of duty and friendship: invited thereto by the laws which gave him the assurance that he will recover expenses, according to *d. § 1. Instit. de obligat. ex quasi contractu*, (I. 3. 27.), but not giving an impunity on the commission of negligence. Add to this that just as (even though perhaps not often, yet at all events frequently) it happens that men hope for more from their own powers than is in them, so also do they expect more from their own industry and diligence in carrying on the affairs of others: so it also happens that they are without difficulty stimulated to carry on the affairs of an absent friend, trusting to the presumption of their own diligence. There are, however, cases in which nothing beyond fraud and gross negligence are to be made good by a *gestor*: suppose he had undertaken the already neglected affairs of a friend, and which were otherwise about to perish or to become deteriorated, to the detriment of the owner, *l. ait. prætor 3, § interdum, 9. ff. h. t.*, or if any one had been appointed by the prætor to be executor or curator of another's affairs, *d. l. 3, § si executor, 8. ff. h. t.; l. prætor, ait 9, § est præterea, 5. ff. de reb. auct. jud. possident.* (D. 42. 5.). Lastly, the successors of the *gestor*, if they have completed the matters left unfinished by the deceased, *arg. l. 1. ff. de fidejuss. tutor* (D. 27. 7.); *l. curatoris, 17. C. h. t.* (C. 2. 19.). These things being so variously defined in our law according to diversity of circumstances, there are not wanting those who think that NOWADAYS it ought wholly to be left to the discretion of the judge, what fault is to be made good in each particular case of "affairs carried on," according to varying condition and quality. *Sim. van Leeuwen, cens. part 1. libr. 4. cap. 26. num. 3.*

5. For fortuitous accident, just as, generally, no one is bound for it by the nature of contract or quasi-contract, so neither is the *gestor*

bound, *l. sive hereditaria*, 22. ff. h. t. For which reason, if a *gestor* had the administration of an owner's money, and by placing it out on interest had contracted credits, he does not make good the risk of such credits, when the debtors have lost their fortunes by fortuitous accident, and so become insolvent, and no negligence of the *gestor* had appeared, in that he did not sooner recover what was placed out on credit, as before stated, *l. litis* 37, § 1. ff. h. t. Unless he had begun a new business in the absentee's name, which business the absentee had not been accustomed to carry on, as if the *gestor* had lent out monies on interest, which monies the owner was accustomed to allow to lie idle (*otiosas*); or by buying very many new slaves for sale, or entering on any extensive trade (*negotatio*): for if any damage result thence the *gestor* will bear it: if any benefit comes, it advantages the owner: so, however, that if in some things there be gain, in others loss, the absent owner ought to compensate the loss with the gain, *l. si negotia*, 11. ff. h. t. (It is otherwise in a partnership), *l. de illo*, 23, § 1 et ll. seqq. ff. pro socio (D. 17. 2.). So also the *gestor* makes good "accident" if he have not paid over to the absent creditors the money realised by the sale of estates, or money recovered from the debtor of the absent creditor: and so, if remaining deposited with the *gestor*, it have perished without his fault, *l. debitor meus* 13. ff. h. t., so also if he rather acted as a thief than a *gestor*, wickedly undertaking the conduct of the business, not with a view to the gain of the owner, but for his own gain, *l. si pupilli* 6, § sed et si quis 3. ff. h. t.; arg. *l. fidejussor* 32. verbis non etiam casum quia prædo fidejussor, non videtur. ff. h. t., and, generally, whenever he cannot summon the owner in the "contrary action," unless in as far as he has been made richer. But it is erroneous that the *gestor* should then also be bound to make good fortuitous accident, when it has been agreed upon by special pact, for the nature of this "gestion," which constitutes a quasi-contract, is repugnant to such a pact being initially entered into without the preceding mandate of the owner. Whence it is scarcely to be doubted that, *l. negotium*, 22. C. h. t. (2. 19.) is a stray passage, placed there by the carelessness of the compilers, instead of being transferred to the title of mandate: unless we wish to understand that law as referring to a special pact interposed not from the beginning, but after a business already commenced: for such is the mention made of a special pact in "affairs managed," in *l. sed an. ultro*. 10. pr. ff. h. t.

6. Nor can the *gestor* only be summoned as to those things which he has managed, but also for those things which have not been managed, or which have been neglected, provided he ought to have managed them. For he ought to have managed and perfected those things which he began: he is not bound to commence new things: for as the Emperors say in *l. tutori* 20. C. h. t., and as Papinian says in nearly the same words in *l. tutores* 39, § qui se negotiis 2 ff. de administr. et. perii tutor. (D. 26. 7.) "it is the *gestor's* own wish that fixes the limit of his administration; and it sufficiently and

abundantly satisfies, if any one studies the benefit of another, in a few things, with the labor of a friend, *adde l. sed et cum* 16. *l. nam. et Servius* 21, § *si vivo*. 2. *ff. h. t.* Unless another would have commenced them but desisted on seeing another carrying them on, or unless a subsequent transaction was neglected which should have been joined on to a prior completed transaction, so that another diligent man would also have conducted the subsequent transaction, *si pupilli* 6, § *ult. ff. h. t.*; or lastly, if the gestor had so approached matters from the beginning that he undertook to manage all the affairs of the absent person, *l. sed et cum*, 16. *ff. h. t.*; so also if the gestor were a creditor of the person whose affairs he conducted, and have money ready of the absent party, he is ordered not only to pay the other creditors of the absent party, but also to pay himself; both that he may avoid the risk of the monies, and that he break the further course of interest, *l. debitor meus* 13. *ff. h. t. junct. l. divortio* 35, § *illum*. 1. *ff. h. t.* It is the same if he have the redhibitory action or is bound by that action, and either a thing to be restored or money to be returned is found among the goods of the absent person, *d. l. 35*, § *sed nec*. 2. *ff. h. t.* And if he were a debtor of money it is necessary also that he recover it from himself, so that if he does not recover from himself, he not only causes a debt which is one not bearing interest to become one that does bear interest, unless interest were specially remitted from such debt, *d. l. 6*, § *ult. l. divortio* 35, § *ult. l. qui sine usuris*, 38. *ff. h. t.* or if the owner were not in the habit of lending his money out on interest, *arg. l. qui semisses* 13, § 1. *ff. de usuris* (D. 22. 1.) but he also brings it about that what is extinguished by time or death, can nevertheless be recovered by this gestate action, *l. si autem* 8. *l. atquin*. 19. *ff. h. t.*, as if the action which ceases by death or lapse of time, had already been transferred into a negotio-gestate action at that time when the affairs began to be managed, which also obtains in the case of a husband who, after divorce, is a debtor for the *dos*, if he have managed the business of his wife, and did not recover from himself the *dos* at that time when he could have paid it in full, *l. divortio* 35. *ff. h. t.* Nay, indeed, if the gestor have imprudently bought from another the thing of an absent person whose affairs he was conducting, and he become aware before usucapion is complete that it is the property of the absent person, it is enjoined on him that he get some one to claim the thing from him in the name of the absent person: so that both the absent owner may secure what is his own, and that the "action on the stipulation" as to eviction may effectually accrue to the gestor. Nor will he seem to have committed fraud by this submission, for he ought to do so in order not to be bound by the negotio-gestate action, *l. atquin* 19, § *cum me* 3. *ff. h. t.* Nor is he understood to commit fraud who avoids and excludes fraud, *l. 77*, § 31. *ff. de legat. 2.* (D. 30. 2.)

7. But whether he can recover from other debtors of the absentee what they owe is NOT WITHOUT DOUBT. It is the MORE CORRECT OPINION

that the gestor cannot efficaciously sue them by judicial interpellation: for neither can the debtor safely pay another than the creditor; nor, on payment, will he be freed if the creditor does not ratify the payment *l. dispensatorem* 62. in fine *ff. de. solution* (D. 46. 2.). Nor has any one who it is clear is without mandate the power of instituting an action for another in court, *l.;* *si. pupilli* 6, § *ult. ff. h. t. l. tutori* 20. in fine *C. h. t.* (C. 2. 19.) *l. naturalis* 5, § *sed si facio* 4. *ff. de præscriptis verbis.* (D. 19. 5.) unless the gestor were a "conjoint person" of the person whose things he was taking care of, and in that way has the power of "proceeding" without mandate, and it would not at all be troublesome to him to give security as to ratification: in which case he not only can, but ought to, require, if the gestor have entered on the conduct of affairs from their inception, that he should manage all the affairs of the absentee, *l. si autem is.* 8. *ff. h. t.* joined to *l. sed et hæc.* 35. *ff. de procurator.* (D. 3. 3.). But this does not prevent any gestor, even a stranger, calling upon the debtors of an absent person, by extrajudicial "denouncement," to pay up, with this effect, at all events, that the debtors will seem to have made delay to the creditor from such time of interpellation, and to incur the common penalties of delayers, *l. si quis solutioni* 24, § *ult. ff. de usuris* (D. 22. 1) *l. si pupilli* 6, § *item. queritur* 9. *ff. h. t.* Nor in this case does there seem to be an acquisition by an independent person, but the fulfilment of a duty, just as when anyone conducting my affairs arrests anyone committing a theft on me, he prepares for me the action of "manifest theft," so also, when an attorney has interpellated anyone as a promiser he makes the stipulation perpetual as Paulus elegantly reasons, in *d. l. 24. in fine ff. de. usuris* (D. 22. 1.). But as there is NOWADAYS scarcely any pecuniary utility in extrajudicial interpellation, as will be more fully shown in the *tit. de usuris* (Tit. 22. 1.) and as "conjoined persons" are not NOWADAYS admitted to sue for others without mandate, as was explained in *tit. de procuratoribus* (*ante*) this question is of less practical use in our Courts. *Add. Groenewegen ad l. 8. ff. h. t.*

8. The "contrary action" of *negotio gestate* competes to the gestor and his heirs against the owner whose affairs were conducted during his absence and without his knowledge, and if the affairs of a minor have been thus conducted, the action is not against the ward but rather against the tutor; for since the tutor himself, by virtue of his office, should have conducted the ward's affairs, it is assumed that the affairs of the tutor have been managed while care was being taken of that which was the pupil's, *l. si pupilli* 6. in *pr. l. litis contestatæ* 37. *ff. h. t.* unless the pupil appear to have been "made the richer" at the time of the contestation of suit, *l. contra* 2. *C. h. t. d. l. ff. h. t.* (C. 2. 19.) or if estate-affairs have been managed and afterwards the pupil have become heir, because the beginning of every matter is to be regarded *l. nam et Servius* 21, § 1, *junct. l. Pomponius* 15. *ff. h. t.* The object of the action is that the bringer may be indemnified and be

recouped what he lost or may lose on account of the gestion, lest the office should be injurious to him, *l. 2. ff. h. t.* Hence if he bound himself for an absent owner, or bound his goods, he rightly prays that he or his goods may be liberated from the obligation, *l. 2. l. si quis. mandato 28. ff. h. t. arg. § tutores 2. in fine. Instit. de obligat. ex quasi contractu* (I. 3. 27.), sometimes he even claims that actions may be ceded to him, *l. qui injuriæ 53, § qui alienis 3 ff. de furtis* (D. 47. 2.), or that security may be given to him for the restitution of that which he would lose by reason of the gestion, *l. liberto 31, § inter 1. ff. h. t. arg. l. si mandata 45, § 2. ff. mandati* (D. 17. 1.). But this action is especially provided that the *gestor* may recover his necessary and useful expenses, among which useful expenses is also included expense honestly incurred for honors attained by degrees, *l. quæ utiliter 45. ff. h. t.*, also the interest which he gave himself for the money accepted on loan from others for the use of the owner and disbursed, or which he might have gathered from his own money spent for the benefit of the owner, *l. 2 in fine l. atquin 19, §. pen. ff. h. t. l. ob. negotium 18. C. h. t.* (C. 2. 19.) *l. et in contraria 37. ff. de usuris* (D. 22. 1.). Nor can the contrary be proved from *l. quid ergo 3, § plane 2. ff. de contraria tutelæ et utili action.* (D. 27. 4.) for the meaning of that *lex* is this, that the interest of monies which the tutor accepted on loan for the use of his ward, ought to be compensated with that interest which the tutor could have received from moneys of his ward not put out on interest when they might have been. NOWADAYS, however, it is COMMONLY RECEIVED that he whose affairs have been managed is to be condemned in interest on monies disbursed, not from the time of disbursement, but only from the time of contestation of suit, *Groenewegen ad. l. 18. C. h. t.* as generally also obtains in other cases also, as will be said in *tit. de usuris* (Post. Tit. 22. 1.).

9. Whether, however, the utility of the expenditure still continues, or not, does not matter: for it suffices that the *gestor* has conducted affairs usefully, although the transaction has not had effect: and therefore, if he propped up a building, or tended a sick slave, he would recover as a *negotiorum gestor*, even if the building were destroyed or the slave died, provided only the expenses were usefully made from the beginning, for if not even an initial advantage were apparent, this contrary action would be refused; for although we should not regard the result, yet there ought, at all events, to have been a useful beginning: *l. sed an ultro, § 1. ff. h. t. l. 10 C. h. t. arg. l. quod si servus 3, § unde recte 7 et § 8. l. servus in rem. 17. ff. de in rem. verso* (D. 15. 3.). Wherefore if he have spent more than he ought, he only recovers that which he ought to have spent, *l. si quis negotia 25 ff. h. t.* (3. 5.). But this MUST NOT BE PASSED BY WITHOUT MENTION, that he who, for the sake of his own gain, has interfered with another's affairs, cannot recover more by this action than in as far as he whose affairs were thus conducted became thereby the richer: *l. si pupilli 6, § sed et si 3. in fine ff. h. t.* I cannot admit that at the end of this third paragraph for "action" should be read "reten-

tion," as if the subject was there a *mala fide possessor*, who has no action for recovery of expenses: because if such emendation were admitted there is no less difficulty than in the retention of the common reading. For if a *mala fide possessor* incurred expenses with the intention of carrying on the business of those whose property it was, he would have the ordinary action of *negotiate-gestate*, not merely for so much only as he whose property it was was made the richer, but for the whole of what, regard being had to the commencement of the gestion, was usefully spent, according to the ordinary nature of that action. But if such intention to carry on another's business were wanting, he can recover the necessary expenses as a whole: useful expenses he can recover neither as a whole nor in part in as far as the owner is thereby made the richer, but he has only the liberty to take *ex bono et æquo* as far as that can be done without injury to the thing itself: which is very fully laid down by the Emperor Gordian: in *l. domum 5 C. de rei vindicat.* (C. 8. 82.) where he says (text quoted): And therefore if the said passage treated of a *mala fide possessor* he either ought to recover all expenses by retention in the case where they are necessary expenses, according to *d. l. 5.* or none at all, not even those whereby the owner has been made the richer, if they were only useful expenses: *d. l. 5 et § ex diverso 30. in fine. Instit. de rerum div.* (I. 2. 1.) whereas in *d. l. 6, § 3.* either action or retention is generally said to be allowed for that whereby the owner has been made the richer. As this is so, it is nearer the truth to deny that *d. l. 6, § 3.* treats of a *mala fide possessor*, to say that it rather treats of a *negotiorum gestor*, who did not possess another's property, but only took care of another's business, and dealt with it, the professed object of the gestion being the advantage of the owner, the reality being for the sake of one's own gain, his mind being intent on his own advantage and use. As such an one, therefore, was not summoned by a *rei-vindication* or any similar petition, *in rem*, by which the possessors of others' goods are wont to be compelled to make restitution, but by the direct *negotio gestate* action, according to what he has, *d. l. 6, § 3.* so it was fair he should have the contrary action of *negotio gestate* given to him: but inasmuch as all the requisites of *negotiate-gestion* were not present, *since he had in view his own gain and not the advantage of the owner*, therefore it was that he also obtained less, namely only that by which the owner was made the richer. This at least is manifest, that neither in the said § 3, nor in the whole sixth law, is any mention made of a *mala fide possessor*, but of him who "wickedly for the sake of his own gain, approached my business, and carried on my business, not contemplating my gain, but his own." Nor is it new that he also who is with fraud and acts dishonestly has an action for indemnity, or, to be placed beyond damage. For though the laws do indeed refuse to a thief the *actio furti*, lest he should be the gainer by his own improbity, *l. itaque 12, § sed furti 1. de furtis* (D. 47. 2.), yet they gave him the repetition of a *commodate*, *ita. at. 16 ff. commodati* (D. 13. 6.).

10. This "contrary action" altogether ceases if, regard being had to the commencement of the gestion, no advantage at all could accrue to the owner: as if the gestor paid what was not due, or more than what was due, *l. si quis negotia* 25. ff. h. t.; or if any one pay money for a debtor when it was to the debtor's advantage that it should not be paid, owing, perchance, to the right the debtor had of retention or a similar cause, *l. cum pecuniam* 43. ff. h. t., although he believed that he was doing that which would be useful to the owner: *d. l. 10 in fine. ff. h. t.* or if the expenditure were made only for the sake of pleasure, *l. ex duobus* 27. ff. h. t.; *l. quod si servus* 3, § *sed si mutua* 4. ff. de in rem verso. (D. 15. 3.) unless, however, the owner had interposed his ratihibition in respect of things uselessly carried on, or for the sake of pleasure only, or even in regard to what was badly conducted, for expenses which are in any way considered ratified are to be restored: *l. Pomponius* 9. ff. h. t.

11. It also ceases if any one have carried on the business of one who was unwilling and prohibited it: and this as regards expenses incurred after the prohibition was made, but not in respect of those which were incurred before the prohibition was made, *l. ult. C. h. t. l. si autem* is 8, § *Julianus* 3 ff. h. t. But as it seems unjust that one person should be made richer at another's loss, it seems rather to be admitted NOWADAYS that the repetition should at least in so far be conceded as the owner was thereby made the richer: on the analogy of him who incurred expenses when he was a *mala fide possessor*, as will be elsewhere said. This is the view of *Groenevegen ad. l. ult. C. h. t.*, following *Zypæus*, *Christinaeus*, and others. Yet such repetition is denied on proof that another person would have incurred such expenses from his own funds: *l. contra* 2. C. h. t. (2. 19.) or if incurred for a reason of piety without intention to recover: this is, in a doubtful case, to be presumed in the case of a mother supporting her children, or praying that the tutors of her children may be declared suspect, or petitioning that a tutor may be granted to her children not having any tutor: *l. Nesennius* 34. *l. is qui amicitia* 44. ff. h. t. l. 1, § 11. C. h. t. also in the case of a father incurring expenses to assist in his son's education: *l. quæpater* 50 ff. *familie. ercisc.* (D. 10. 2.) or a husband incurring expenses for the cure of a sick wife: *l. quod in uxorem* 13. C. h. t. (2. 19.) There will, however, be room for the repetition, if any of these persons can show that from the beginning he did not expend the money for reasons of piety, but with an intention to recover: *d. l. Nesennius*, 34. *in fine ff. h. t.*, or that when incurring such expenditure he had the administration of goods belonging to him for whose use and advantage the expenditure was made: for then he is to be considered as having made the expenditure, not on his own account, but for account of the persons for whose sake he made it: arg. *l. ult. ff. de petit. hered.* (D. 5. 3.) *Sande decis. Frisic. libr. 2. tit. 8. defin. 3. add. Carpzovius defin. for part 2, constit. 10. defin. 22. et seqq.* Nay, that in a doubtful case this intention to recover is, ACCORDING TO MODERN CUSTOMS, to be presumed in the case of a

mother praying that the tutors of her children may be declared suspect, Groenewegen, following others, lays down in *d. l. 1. C. h. t.*

12. Moreover, to found this action, it is not necessary that the gestor should precisely have the intention of binding him whose affairs were in truth conducted, but it suffices that he thought he was conducting, and wished to conduct, the affairs of another. For what if he thought that he was conducting the affairs of Titius, when they were really not the affairs of Titius but of Mævius? It is answered that he can with effect proceed in such a case against Mævius, *l. item si 5, § 1. l. si pupilli 6, § si Titii 8. ff. h. t. arg. l. 29. ff. comm. divid.* (D. 10. 3.) *l. quæ utiliter 45, § ult. ff. h. t.*, and even against Titius himself if he have ratified what has been carried on: for his ratihabition makes that to be his business, where from the beginning it was not in reality, but had by an error been undertaken supposing it to be his, *l. si pupilli 6, § item quæritur 9. et § 10 ff. h. t.* because Titius himself, after ratification, was in turn bound by this action to him whose business it really was, just as if he had himself carried it on, *arg. l. ait. prætor 3, § ult. l. nam. et 21, § ult. ff. h. t.* And if he thought himself bound by necessity of his office to carry on the business, when there was no such necessity, yet, it has been laid down, this action may be brought by him, *l. ait. prætor 3, § hac. actione 10. l. atquin 19, § si libero 2. ff. h. t.; l. curatorem 6. C. h. t.* (2. 19.) Lastly, if, in error, I think that the gestion were mandated to me, whereas a mandate was wanting, even then recourse may be had to this negotio-gestate action, as the authors of our law have laid down: *l. item si 5. ff. h. t. Add. l. fidejussor 32. ff. h. t.*

13. It is a POINT OF MORE CONTROVERSY whether this action is to be allowed if any one carried on the business of another as if it were his own: as if, thinking he was heir, he in his own name paid estate debts, to estate creditors. In this case it should rather be laid down, that a condiction of what was undue should be given to him against the creditor than an action of negotio-gestate against the heir: because by such payment the true heir or the particular true debtor, was not liberated, *l. cum quis sibi 38. § de peculio, 2. ff. de solutionibus.* (D. 46. 3.); *l. si pœna. 19, § quam vis 1. ff. de conduct. indeb.* (D. 12. 6.). Nor is it opposed to this view that Africanus seems, in such a case, to grant the negotio-gestate action, adding as a reason that the debtor was freed by such payment, *l. ult. ff. h. t.*, or that the possessor of an inheritance, who was condemned to make restitution thereof, was conceded the liberty of deducting what had been paid, *l. 4. l. 5. C. de petit. hereditat.* (C. 3. 31.). For we may advantageously (so as to bring Africanus into agreement with himself and his rescripts), accept the said *l. ult.* as simply speaking of the possessor of an estate, who paid the debt not in his own name, but in the name of the estate. Whereas, on the other hand, in *d. l. 38, § 2. ff. de solution.* (D. 46. 3.), he treats of that possessor of an inheritance who pays money which was undue,

"not in another's name, but in his own," as the words of the *lex* have it. Which distinction as to whether he paid in his own name or not in his own name, can also be confirmed by, *l. si quid possessor*. 31. *ff. de petit. hered.* (D. 5. 3.), joined to *l. hereditatis* 50, § 1. *ff. eod. tit.* Vide *Cujacius ad Africanum, tract. 7. ad l. 38, § 2. ff. de solut. et tract. 8. add. l. ult. ff. h. t.; Ant. Fabrum rational. ad l. ult. h. t.; Donellum Comment. jur. civilis. libr. 14. cap. 13.*

14. If the owner has ratified that which was done in his name, the action of negotio-gestate still remains after the ratihabition, as is laid down by the emperor in *l. si pecuniam* 9. *C. h. t.* (2. 19.), and by Scaevola in *l. Pomponius*, 9. *ff. h. t.*, just as if nothing was effected by such ratihabition, nor would it matter whether what was done was ratified or not, *l. si is qui*. 50. *ff. mandate* (D. 17. 1.); *l. si pupilli* 6, § *sed. si ego* 6. *ff. h. t.* On the contrary there would then be place for the action of mandate, because ratihabition equals a principal mandate, and completely retrohates to it, as is argued in, *l. semper qui non prohibet*. 60. *ff. de regulis juris*. (D. 50. 17.); *l. ult. C. ad senatus Macedon. l. licet verum* 56. *ff. de judiciis*, (5. 1.). Whatever may in this respect be the view of *Pacis Enant. cert. 2. num. 53*, and others, I THINK that you should see with what intention the ratihabition was interposed. For if it were interposed with the intention that the negotio-gestate should pass into a mandate, the action of mandate would not be denied: but if that intention were wanting, nothing else would compete, save that which was initially born, namely, the suit of negotio-gestate. In what way in this and other matters we must determine by intention what kind of matter has arisen, can be gathered by what is laid down by Ulpian in *l. juris gentium* 7, § *quod fere* 12. *ff. de pactis* (D. 2. 14.) who, in treating of a doubtful point, and one not very dissimilar to the point under consideration, *viz.*, whether a pact or only a stipulation must be taken to have been entered into, says, as to the words: "Titius asked, Mævius promised," which it is the custom to insert in almost the very end of pacts, "these words are not only received by way of pact, but also of stipulation, and therefore the action on the stipulation arises, unless the contrary is specially proved, that it was not done with the intention to stipulate, but only to pact."

TITLE VI.

OF CALUMNIATORS (RECIPIENTS OF MONEY FOR BRINGING OR STAYING LAWSUITS.)

SUMMARY.

1. A "calumniator" as the term is used in this title (distinguishing it from its other use to designate bringers of false accusations, or unjust and fraudulent civil suits), is one who receives money or other consideration for bringing a calumnious suit: receives it at any stage, and personally or by others. No matter whether what is promised is done or not. A praetorian action was given for the four-fold within the year, for the single value after. Order, limitation and modification stated.
2. This action is given to the person against whom the suit was to be brought or not brought. Not to the calumniator for what he gave, for having acted dishonourably he cannot recover. Nor to heirs, for like the action of injury, it is personal. But heirs can recover what the deceased gave.
3. It is given against those who *take* money, *not* to bring suit. Not against their heirs unless they are the gainers. The Roman law did not bind heirs for the deceased's delicts, but made them return what they had gained. Nor against him who gave money: he loses what he gave, only.
4. At the entrance to a suit the "oath of calumny," is administered to the parties in order the better to banish calumny from legal proceedings, and repress such litigants. The plaintiff swears as to his freedom from it, or his action drops: the defendant swears the same or he is held to confess judgment. Tutors and curators must take the oath, or they cannot appear. The new law did not remit this necessity.
5. Oath of calumny, unlike oath of verity, cannot be remitted by either adversary or Judge, as it is not a private but a public matter. If, however, perchance unexacted, proceedings stand nevertheless.
6. Advocates took it, as shown before. Voet thinks attorneys also took it by Roman Law. By Canon Law they did. By MODERN LAW both take it.
7. Obsolete. Slavery.
8. NOWADAYS oath of calumny not so much in force among suitors. Condemnation in costs restrains such actions. And fines are fixed on each appeal from judgments of Courts or arbitrators.
9. If appeal on several heads partly succeeds, partly fails, the Judges apportion costs. Rash litigants and appellants extraordinarily dealt with at discretion.

1. A "calumniator," in criminal cases, is one who knowingly lays false criminal charges, *l. 1, § ff. ad Senatuscons. Turpill.* (D. 48. 16.): in civil cases, one who by fraud makes a suit unjust to another, whether

as plaintiff or excipient. But in this title a calumniator is, in a stricter sense, said to be one who receives money or any other thing in order that a suit should, or should not be brought, calumniously. It is the same thing if he had indeed not received money, but is freed from any obligation, or, if money is given to him to use gratuitously, or the property of a minor sold or let to him. Nor does it matter whether he received it before the suit is contested, or only pending the suit, *l. 1, § 2. ff. h. t.*, nor whether it is given to him or whether he have ordered it to be given to another, or have ratified it when accepted in his name: for, generally speaking, if he has in any way received gain, he is a calumniator, *l. 1, § ult. l. 2. l. 3. ff. h. t.* Nor, lastly, does it matter whether he did or did not fulfil that on account of doing or not doing which he received money, for it is the very calumnious taking of the money which makes the delict, *d. l. 3, § 1. ff. h. t.*: for the sake of repressing which a prætorian action *in factum* was given against calumniators, for fourfold within a year, after a year for the single amount of the money received, unless the conditions were such that what was given could be recovered, in which case it is not necessary that the action for the single amount should be given after the year, *l. 1. l. in heredem, 5, § 1. ff. h. t.*, the year is computed from the time of giving, if any one has given anything in order that a suit may not be brought against himself, it is computed from the time of his knowledge if another have given anything, *l. annus. 6. ff. h. t.* Nor is the quadruple the pure penalty, for it includes the thing itself, or that which is given, *d. l. 5, § 1. ff. h. t.*, unless any one has given anything in order that a suit be not brought against another, for then both he who gave can recover what is given, and over and above that, the action for the quadruple is wholly open to him on account of whom it is given, that calumny should not happen to him, *l. si quis ab alio 7. ff. h. t.*

2. This action competes to him against whom the suit was to be commenced by reason of the calumny: and also to him who gave anything that the suit should not be instituted against him; so that if any one received money from thee to proceed against me, and from me that he should not proceed against me, he is liable to me in two proceedings for calumny, *l. generaliter 3, § ult. ff. h. t.* The action is not, however, given to him who gave anything that a calumny should be done to another, nay, he cannot even recover what he has given to another, since he has acted dishonourably, *d. l. 3, § ult. ff. h. t.*: nor is it given to him who gave anything lest a suit should be commenced against a third person, for he has only the repetition of what is given, *l. si quis ab alio 7. ff. h. t.*; nor lastly, is it given to the heirs, for this action, on the analogy of the action of injury, only includes the mere prosecution for the avenging of the wrong, but the recovery of what has been given is not to be denied to the heirs whenever the deceased person has given anything.

3. The action is to be brought against those who have received money

that they should not commit calumny on another, as before stated. But not against their heirs unless anything has accrued to them; for the disposition of the Roman law did not allow heirs of deceased persons to be bound for delicts, nor did it permit that they should reap gain by them, but the rather ordered that base gains should be wrung from heirs, although the crimes had been extinguished by death *l. in heredem. 5. pr. ff. h. t.* So neither a parent nor a patron can be summoned by this action *l. parens 5. ff. de. obsequiis parent. et patron (D. 37. 15.)*, nor he who gave anything that a suit should be commenced against another, for although he himself seems to be the institutor of the suit who gives a mandate to another to act calumniously, and helps him with money to that end, yet since the crime which is to be covered by this action does not consist in the suit put in motion by the calumny, but only in the calumnious taking of money or other gain, even if nothing be executed *d. l. 3, §. 1. ff. h. t.* therefore, he who gave the money indeed loses it as the penalty of his evil-doing, but is not subject to this proceeding for the quadruple.

4. It has been further introduced in practice in order that all "calumny" may be wholly absent from judicial proceedings, and the rashness of litigants may be repressed, that at the entrance to the suit the "oath of calumny" be interposed; this is an oath not of verity, but of belief framed as to the bona fides of the litigant: the plaintiff swearing from the knowledge and feeling he has of his own mind, "that he does not institute the suit for the sake of calumny;" the defendant swearing that he does not make denial for sake of calumny, *l. 2, § 2. C. de jurejurando propter calumniam dando (D. 2. 59.) l. inter 44, § qui familia 4. ff. familiæ erciscundæ (D. 10. 2.)*. the form for plaintiff and defendant being joined for each litigant whenever there are mutual proceedings, just as division of inheritance and the like, and the parties are both plaintiffs and defendants at the same time, *d. l. 44, § 4. ff. famil. ercisc. (D. 10. 2.)*; tutors and also curators are not to be admitted to institute an action for their wards unless they have interposed this oath, *l. 2, § 2. C. de. jurejur. propt. cal. (C. 2. 59.)*. And if the plaintiff is unwilling to take the oath he falls away from the instituted action as a wicked litigant, and is to be rejected at the threshold of the proceedings, *d. l. 2, § quod si actor 6. C. jur. prop. cal. dando (2. 59.)*. But if the defendant refuses he is taken as confessing judgment, *d. l. 2, § 7. C. eod. tit.* Nor is the necessity for this oath at all remitted by the new law *novel. 49. cap. 3.* although by the old law parents and patrons were freed from it, *l. de die 8, § jubetur 5. ff. qui satisd. cog. (D. 2. 8.) l. si. patronus 16. ff. de. jurejurand (D. 12. 2.) l. qui bonâ fide 13, § penult. ff. de damno infecto (D. 39. 2.)*. Since there is a manifest meaning and a consistent reading in these laws, it is right that in *l. jurejurandam 34, § 4. ff. de jurejurando (12. 2.)*, for neither (neque) patron nor parent should be read, "patron equally (æque) with parent" as has been already observed by others. Clerics are also freed

from this oath, for they are entirely prohibited from swearing, *l. cum clericis* 25, § 1. *C. de. episc. et cleric* (C. 1. 3.), and by the feudal law neither the lord could exact this oath from the vassal nor the vassal from the lord (*libr. 2. feud. tit. 33, § 1.*).

5. And although the "oath of verity" may be remitted by an adversary to an adversary, or to a witness appearing against him, because in that way he only renounces his own right, and, as it were, makes his adversary a present of the cause, yet the oath of calumny can neither be remitted by the adverse party nor by the judge: since such oath does not concern the private individual advantage but the public advantage, lest tribunals should resound with unjust suits, concocted by calumny: suits should rather be diminished and calumniators also: *l. 2, § sed quia, 4. et § sic enim. 8. C. de jurejur. propter calumn. dando* (C. 2. 59.). If, however, this oath of calumny, when it should have been exacted, has neither been exacted by the judge nor by the adversary, the judicial proceedings will not on that account be *ipso jure* null, nor the sentence invalid, arg. *l. filius familias* 8, § *veterani* 2. ff. *de procurator.* (D. 3. 3.) this was also nominately so provided by the Canon Law: *cap. in med. de jurejurand. calumniæ* in 6. *Perezius tit. C. de jurejurand. propter calumn. dando num. 9. Bittershusius ad novell. part. 9. cap. 19. num. 15. Andr. Gayl. lib. 1. observ. 85 num. 2.*

6. Moreover, not only are the litigants themselves ordered to interpose this oath, but also their advocates, as said in *tit. de postulando* (Ante). With regard to attorneys, although it is not found laid down generally or clearly in the civil law that they should take the oath of calumny, yet as the necessity of taking this oath was imposed on tutors and advocates, there is no reason why attorneys should not also be compelled to take it, especially when they become "rulers of the suit" (*domini litis*): and the reason for this I TAKE TO BE that if anyone in his procuratorial capacity exacted security as "to threatening damage," he had to swear that "he in whose name prayed by way of security would not have prayed it for calumnious cause," *l. qui. bona* 13, § *si alieno* 13 ff. *de damno infect.* (D. 39. 2.). Whatever the practice may have been according to the Roman law, by the Canon law, at all events, it was enjoined on attorneys that they should not only interpose this oath in their principal's name but in their own: *cap. 2. in. med. de juramento calumniæ*, in 6. *Perezius d. tit. C. de jurej. propter calumniæ dando num. 5. Andr. Gayl. libr. 1. observ. 88. in. pr.:* see where the last author treats fully concerning this oath and the practice of the courts in *d. libr. 1. observ. 83. et seqq. usque ad observat. 91.* And by OUR LAW and other laws it is equally the public duty of an attorney and of an advocate, nay, on entering office they are compelled to offer the oath of calumny, and annually to repeat it at a stated time: *Instructions of the Court of Holland, art. 71: of the Ultrajectine Court, tit. 5. of Attorneys, art. 1. Of Brabant, art. 287. 288. joined to art. 322. 323. Of Flanders, art. 153. 154. 155.*

7. There was further, in the Roman law, a known action of calumny granted to him against whom a question of slavery had been improperly raised, an action for a discretionary punishment, or even up to exile: *l. cui necessitas*, 36, § 1. *ff. de liberati causa* (D. 40. 12.) *l. si tibi* 31 *C. Eod. tit.* (C. 7. 16.). There was also, of old, an action of calumny against plaintiffs, in the tenth part: which was afterwards abrogated: § 1. *Instit. de pena temer. litig.* (I. 4. 16.) *l. 2*, § *sic enim* 8. *C. de jurej. prop. calumn. dando* (C. 2. 59.) but was partly restored by the most recent law: *nov. 112. cap. 2*.

8. NOWADAYS, in Holland, there is scarcely any use of the oath of calumny being taken by the plaintiff himself or the defendant before the contestation of suit. But when litigants are ordered, when a suit is pending, to respond to interrogatories, there is a necessity for this oath: on which point see more fully, the *tit. de interrog. 4. jure faciend.* (Post: Tit. 11. 1.). Besides, the temerity and calumny of litigants is nowadays mostly restrained by condemnation in costs of suit, as to which I will treat in the title *de re judicatâ* (D. 42. 1.) So also fines are fixed in every Court against those who rashly appeal from the sentences of inferior Courts or seek the "reduction" of an award of arbitrators, or its "reformation" or "revision" or "reaudition," (there must be a latitude of terms received in Court practice,) or "restitution" or penal mandates against the execution of a sentence, or the like things: as to which see the very recent placaat of the Courts of Holland and Zeeland, commonly called, "*Further provisional agreement between Holland and Zeeland*, 11 June, 1674, art. 36, *et seqq. usque ad art. 46*. Also the *Instructions of the Ultrajectine Court, tit. on appeal*, art. 2. 3. and *tit. on revision art. 1*. *Placaat ord. in general* 24 May, 1680. This way of fining those who rashly appeal to a superior judge also found favour with the Romans of old, as we are told by *Brissonius antiq. libr. 2. cap. 18*, and not very dissimilar to this was the olden practice of depositing money at the beginning of the suit, and the interposition of sureties on appeal, according to which the conquered party was fined by the loss of the money deposited. As to which see *Rævardus libr. 5. varior. cap. 10*. which promises between plaintiff and defendant, depositing money, were also approved of in Holland in former ages, so that if the plaintiff or defendant refused to make them he lost the suit, and when he had made "sponson" and lost, he lost his money then deposited, as we are told by *Grotius, manud. ad. jurispr. Holl. libr. 3. cap. 3. num. 115. 116*.

9. If an appellant from a judgment consisting of various heads, succeeds in some and fails in others, it seems it should be decreed by the discretion of the judge, whether, and how far, the fine for rash appeal should cease: as is also laid down by the *Instruct. of the Supreme Court*, art. 221. *Of the Ultrajectine Court, tit. of appeal art. 9*. Just as, on the other hand, if the calumny of the litigant be enormous and continued, the judge can impose the penalty of extraordinary calumny: *arg.*

l. pen. ff. h. t. which is also laid down in the *Instructions of Holland*, art. 213. *Ultraj. tit. of appeal*, art. 2. *in fine*, and so also a certain rash litigant, on account of his exceeding calumny, was condemned, besides the ordinary fine for frivolous appeal, in a fine of three hundred florins, to be spent in the adornment of the bench in the public Court-room, as is witnessed by *Neostadius, Cur. Sup. decis.*, decis. 88. *in fine*.



